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Map of Routes
in the
PRINCIPAL MINING DISTRICTS
of the United States of
MEXICO.
STATE OF
DURANGO
STATE OF
NEW LEON
STATE OF
SAN LUIS POTOSI
STATE OF
GUADALAXARA
STATE OF
GUANAJUATO
STATE OF
QUERETARO
JALISCO
TERRITORY
OF
COLIMA
PACIFIC
OCEAN
VALLADOLID
STATE OF
MEXICO
STATE OF
LA PUEBLA
STATE OF
OAXACA
GULF
OF
MEXICO

MEXICO IN 1827.

VOL. II.

Shortly will be published:

SIX VIEWS

of the great Towns of ZACATECAS, SOMBRERETE, CATORCE, TLALPUJAHUA, GUADALAJARA and VALLADOLID, not included in the present Work. Drawn upon the spot, and engraved by MR. PYE.

VIEW OF THE TOWN OF JALAPA. WITH THE COFFRE DE PEROTE

TO

COMMODORE

SIR CHARLES HOTHAM,

KNIGHT COMMANDER OF THE MOST HONOURABLE ORDER OF THE BATH,
ETC. ET.. ETC.

LATE COMMANDER-IN-CHIEF
ON THE WEST-COAST OF AFRICA STATION,

UNDER WHOSE KIND AUSPICES

THE FOLLOWING TREATISE WAS WRITTEN,

This Volume

IS RESPECTFULLY DEDICATED

BY

HIS MOST OBEDIENT HUMBLE SERVANT,

WILLIAM HICKMAN.

00085679

PREFACE.

It is with no ordinary feeling of diffidence that the Author submits to the members of the profession, for whose assistance in the discharge of a most responsible duty it has been undertaken, the following Treatise on the Law and Practice of Naval Courts-Martial.

On foreign stations, where it is impossible to obtain the opinion of the superior authorities on questions that may arise in the course of a trial, a work of reference, adapted to the present time, is universally acknowledged to be wanting. If the Author has succeeded in explaining the form of proceedings required to be observed at courts-martial, and in directing the attention of the officers composing those courts to the rules of evidence usually followed in criminal jurisprudence, the objects he had in view will be accomplished; and he is not without hope that his endeavours may, in some degree, prove beneficial to the service in general.

The Author avails himself of this occasion respectfully to render his humble acknowledgments to the Lords Commissioners of the Admiralty for the assistance they have accorded to him at all times during the compilation of this work. He likewise desires to record his grateful thanks to Captain W. A. B. Hamilton, their lordships' secretary, who, amidst the laborious and multifarious duties attached to his important station, has always patiently and courteously aided, with his professional and official knowledge, in the elucidation of many of the intricate subjects noticed in this Treatise.

Chatham, 1850.

CONTENTS.

INTRODUCTION.

Page

Government of the Navy in former times. — Instructions issued by H. R. H. the Duke of York to Sir John Mennds in June, 1661. — Principal Laws now affecting the Naval Service. - - - - - - 1

CHAPTER I.

CONSTITUTION OF COURTS-MARTIAL.

Constitution of Naval Courts-Martial. — Commander-in-Chief has not, by virtue of his Office only, Authority to call and assemble Courts-Martial. — Under what Circumstances Commander-in-Chief may preside at a Court-Martial in Foreign Parts. — Senior Officers of Five or more Ships detached to be empowered to hold Courts-Martial. — Case of Commodore Johnstone and Captain Sutton. — When it may be improper for the Second Officer in Command to preside at a Court-Martial. — Commanders-in-Chief at the Home Ports may be ordered to preside at Courts-Martial. — Objections made to particular Officers as Members. — When Members are called upon to give Evidence. — When Officers under the rank of Post Captain may constitute a Portion of the Court. — Officers receiving official Notification of Promotion. — Officers promoted by Commander-in-Chief not to sit as Members until confirmed in their respective Ranks. — Lieutenants

Page

acting as Captains of rated Ships. — When two or more Captains are borne on the Books of one Ship. — Officers on Half-Pay, or doing Duty as Secretaries, not eligible as Members of a Court-Martial. — Admirals must have their Flags flying at the Port where the Court-Martial is assembled. — Captains must be present with their Ships to be eligible as Members. — Captains of Ships lost not eligible as Members. — Position to be occupied by Captains of the Fleet and Commodores of the First Class when attending as Members. — Cases where the Attendance of Members may be excused. — Officiating Judge-Advocate to be appointed. — Court not to be adjourned over One Day. — When Circumstances prevent the Court from pronouncing Sentence. — Case of Captain Harris, of H. M. S. "Hussar." — Mode of proceeding at the Assembling of the Court. — Court not to be discharged from giving their Judgment. - - 5

CHAPTER II.

FORMS OF PROCEEDING IN NAVAL COURTS-MARTIAL.

Period within which Complaints must be made in Writing. — Prisoner to be furnished with a Copy of the Charges. — Mode of Proceeding when the Court is sworn. — All Evidence to be given on Oath. - - - 29

CHAPTER III.

EVIDENCE.

Evidence in general. — The best Evidence that can be had to be produced. — Written Documents, how to be received in Evidence. — One Witness generally sufficient. — Case of Lieutenant W. Jones, commanding H. M. S. "Race-horse." — Prosecutor a competent Witness. — May conduct the Prosecution after giving his Evidence. — Case of Captain Thompson, of H. M. S. "Edgar." — Trial not to be postponed. - - 35

CHAPTER IV.

I. CONFESSIONS.

Page

Evidence. — Confessions. — Not customary to call on the Prisoner to plead to the Charges. — A Confession can only affect the Person who makes it. — Evidence of Confession to be cautiously received. — Statements made to a Counsel or Attorney. — Confessions need not be made upon Oath. - - - - - 42

CHAPTER V.

II. PRESUMPTIONS.

Evidence. — Presumptions. — Presumptions in Law. — Sir Mathew Hale on Presumptive Evidence. - - 47

CHAPTER VI.

III. WRITTEN EVIDENCE.

Evidence. — Written Evidence. — Written Documents to be placed before the Court entire. — Written Evidence to be produced whenever it can be had. — Acts of Parliament printed by the Queen's Printer allowed as Evidence. — Prosecutor and Prisoner entitled to call on each other to produce documentary Evidence. - 50

CHAPTER VII.

IV. PAROL EVIDENCE.

Evidence. — Parol Evidence. — Must be of Facts within the personal Knowledge of the Witness. — In Matters of Science. — Idiots and Lunatics. — Persons deaf and dumb. — Infants. — Witness not to be rejected on the

Page

Ground of Crime or Interest. — Evidence of Accomplice admissible. — Lord Chief Justice Holt on the Evidence of Accomplices. — Husband and Wife. — Persons cohabiting together, but not married. — Witness not bound to criminate himself. — In what Cases hearsay Evidence may be received. — Dying Declarations. — Evidence of Seditious Speeches. - - - 52

CHAPTER VIII.

EXAMINATION OF WITNESSES.

Examination of Witnesses. — Prosecutor not to address the Court on the Matter in issue. — Rules to be observed in the Examination of Witnesses. — Witness not to read his Evidence. — May refresh his Memory by referring to Notes or to the Ship's Log-Book. — Rules for the Cross-examination of Witnesses. — Object of cross-examining a Witness. — Party not to be permitted to discredit his own Witness by *general* Evidence. — Credit of a Witness may be impeached by the opposite Party. — Evidence of Seamen should not be rejected on slight Grounds. — Opinion of the Law Officers as to the proper Mode of Proceeding when the Evidence does not affect one or more of several Persons included in the same Charge. — Affidavits from Witnesses who refuse to attend personally not to be received in Evidence. — Letters and Certificates produced by the Prisoner in his Defence. - - - - - - 59

CHAPTER IX.

PRISONER'S DEFENCE.

Mode of Proceeding when all the Evidence on the Part of the Prosecution has been heard. — Prisoner may avail himself of the Assistance of Counsel. — Mode of Proceeding when the Defence has been read. — Prosecutor

Page.

not to call Witnesses after the Prosecution is closed. — Court may call Witnesses, but not as to any new Fact. — Prisoner may address the Court after examining Witnesses in his Defence. — Witnesses not to be examined within hearing of each other. — Captain of the Ship to which the Prisoner belongs generally conducts the Prosecution. - - - - - 74

CHAPTER X.

ATTENDANCE OF WITNESSES.

Attendance of Civilians to give Evidence cannot be enforced. — Penalty for refusing to give Evidence, or prevaricating, or behaving with Contempt to the Court, only applicable to Persons in the Fleet. — In Cases where the Contempt extends to an Interruption of the Proceedings. — Penalty attached to wilful and corrupt Perjury. — Civilians required as Witnesses to have their Expenses paid. — Prisoners of War and Persons confined in any Gaol required as Witnesses. - - 78

CHAPTER XI.

CRIMES COGNIZABLE BY COURTS-MARTIAL.

Crimes cognizable by Courts-Martial. — Civilians not subject to Naval Discipline unless found to be Spies. — Case of Daniel King, tried for endeavouring to corrupt a Sentinel to betray his Trust. — Offences specified in the Articles of War. — Crimes committed on Shore by Persons in the Fleet. — Crimes committed within the Jurisdiction of the Admiralty. — Suggestion for extending the Jurisdiction of the Act 22 Geo. 2. c. 33. — Jurisdiction of the Court of Admiralty. — Acts of Parliament define the Powers of Courts-Martial. — Persons not amenable to Courts-Martial for Crimes committed on board the Queen's Ships after being discharged from the Service. — Officers and Men taking Passage in Ships of War to join other Ships; or borne for Wages and

Page

Victuals; or for Disposal; or as lent to do Duty; or employed in Prize-Vessels. — Opinion of the Law Officers of the Crown respecting Officers and Men employed in hired Vessels, &c. — Subjects of a Foreign State voluntarily entering the Service amenable to Naval Discipline. — Prisoners of War should not be permitted to enter the Service. — Pressed Men not subject to Naval Discipline until rated in some Ship. — Officers and others employed on the Lakes in North America. — Case where a second Court-Martial was held on an Offender before the Sentence of the first Court-Martial was carried into execution. — Officers on Half-Pay, or who have quitted the Service, may be tried for crimes committed by them when serving. — Persons released from Arrest may be tried at a subsequent Period. — Peers of the Realm, when in the Service, subject to Courts-Martial. — Privileges of Parliament do not exempt Persons from Trial by Court-Martial for Offences committed by them in a Naval or Military Capacity. — Marines, when employed in Ships, subject to Naval Courts-Martial; or may be sent to Head-Quarters for Trial. — Circumstances under which the Crimes of Murder and Manslaughter may be taken cognizance of at Courts-Martial. — Case of Francis Ansell, of H. M. S. "Trave," tried for a Murder committed by him on board that Ship when in the River St. Lawrence. — Case of Mr. R. Phillips, Midshipman, against whom a Coroner's Inquest returned a Verdict of Wilful Murder. — Case of Captain Whitby, of H. M. S. "Leander," who fired into an American Coasting Vessel, and killed one of the Crew. 81

CHAPTER XII.

OF PRINCIPALS AND ACCESSORIES IN GENERAL.

Of Principals and Accessories in general. — Of Principals and Accessories in the Crimes noticed in the Articles of War. — Accessories in Murder, Unnatural Offences, and Robbery. — Sections of the Act 7 Geo. 4. cap. 64. applicable thereto. - - - - - 106

CHAPTER XIII.

PRINCIPALS IN THE FIRST DEGREE.

Page

Principals in the First Degree. — Principals in the Second Degree. — Accessories before the Fact. — Accessories after the Fact. — Offences of Principal and Accessory different in consideration of Law. — An Acquittal as Principal no Bar to an Indictment as Accessory - 112

CHAPTER XIV.

OF PLEAS, &c.

Pleas to be pleaded immediately the Court is sworn. — Plea to the Jurisdiction — in Abatement; on the Ground of former Acquittal, or former Conviction. — Case of William Maxwell, Boatswain of H. M. S. "Tweed." — Pardon — having been already punished for the Offence - - - - - 120

CHAPTER XV.

INSANE DELUSIONS AND DRUNKENNESS.

Law relating to Crimes committed by Persons afflicted with insane Delusions. — Drunkenness no Excuse. — Prisoner becoming mad before Trial; or during Trial; or after Trial, before Execution - - - 126

CHAPTER XVI.

APPOINTMENT AND DUTIES OF THE OFFICIATING JUDGE-ADVOCATE.

Appointment and Duties of Officiating Judge-Advocate. — Opinion of Judge Bathurst thereon. — Duty when conducting a Prosecution. — May give his Opinion on all Matters of legal Doubt. — Not to allow Copies of the Sentence to be taken - - - - 132

CHAPTER XVII.

ON THE SENTENCE AND PUNISHMENT.

Page

Mode of Proceeding when all the Evidence has been heard. Cases in which the Court have no discretionary Power as to Punishment. — Commissioned Officers cannot be reduced to a lower Rank.—Case of Lieutenant Franklin, R. M. — When the Charges are proved, Prisoner cannot be acquitted. — Officers dismissed cannot receive Half-Pay by Direction of the Court. — Sentence to express of what the Party accused has been found guilty. — Court to be confined to the Investigation of the Subject Matter of the Charge, and to that only. — Court-Martial has no Power to dispose of the Bodies of Criminals after Execution.—The Punishments awarded must be in conformity with the Usage of the Service. — Court-Martial cannot legally sentence a Prisoner to be imprisoned "*and kept to hard Labour*," or "*to be kept in solitary Confinement*," or to be "*transported*." — Persons sentenced to Imprisonment to be confined in the Gaol of the County where the Court-Martial is held. — Court to state the Grounds whereon they recommend a Prisoner to Mercy. — In Sentence of Death, the Article of War on which the Judgment is founded to be stated. — Minority may vote on the Question of Punishment. — When the Charges are declared to be frivolous and ill-founded - - 139

CHAPTER XVIII.

EXECUTION OF THE SENTENCE.

Execution of the Sentence. — Commander-in-Chief may peruse the Minutes. — Not authorized to pardon Offenders sentenced to Punishment by Court-Martial: nor to remit Sentences: but may suspend the Execution

Page

thereof for a time. — Sentence of Death passed in the Narrow Seas. — In Squadrons detached from the Commander-in-Chief. — In cases of Mutiny. — Pardon granted by Her Majesty on certain Conditions - 158

CHAPTER XIX.

OF ARREST, ETC.

Commanding Officers authorized to place Persons in Arrest for Misbehaviour. — Arrest should not be of a more severe Description then the Case requires. — Complaint to be preferred to Senior Officer at the earliest opportunity. — Circumstances regarding the Complaint to be fully explained. — The Admiralty or Commander-in-Chief to use their Discretion with regard to trying the Party complained of. — Appointment and Duties of Provost-Marshal - - - 162

CHAPTER XX.

OBSERVATIONS ON THE FRAMING OF THE CHARGES - 168

CHAPTER XXI.

FORM OF CHARGES.

Form of Charges. — Remarks on the Crime of Desertion. — Receiving Merchandize in Her Majesty's Ships. — Officers who take no Military Command, to be considered within the Meaning and Protection of the 19th and 22nd Articles of War. — Remarks on the Crime of Mutiny. — Subordinates striking their Superiors. — Murder. — Manslaughter. — Unnatural Offences. — Robbery - - - - - - - 173

AN ABSTRACT OF THE MORE IMPORTANT COURTS-MARTIAL FROM 1829 TO 1848 - - - - 209

APPENDIX.

Page

No. I. — As to the Power of the Court in dispensing with the Attendance of any particular Member - 243

No. II. — The Order for assembling a Court-Martial should be addressed to the first, second, or third Officer in command by Names - - - 245

No. III. — Whether the Members of a Court-Martial who are called upon to give Evidence must, after doing so, necessarily be excluded from the Court - - 246

No. IV. — Whether Lieutenants who are acting as Commanders are eligible to sit as Members of a Court-Martial - - - - - - 249

No. V. — Position which the Captain of the Fleet is to occupy at a Court-Martial - - - - 250

No. VI. — In what Cases Commanders may be called upon to sit as Members of a Court-Martial - - 251

No. VII. — Whether the Captain of a Ship lost which renders him in a State of personal Accusation, and subject to Trial by Court-Martial, renders him ineligible to sit himself at a Court-Martial - - 253

No. VIII. — Case of a Court-Martial proceeding to Trial and Sentence in the Presence of a Captain who ought to have been a Member of the Court, but whose Arrival was not made known until some time subsequent to the Court being sworn - - 255

No. IX. — Whether the Captain of a Ship that has sailed from and is out of Sight of, but still within the Limits of, a Port, ought to sit as a Member of a Court-Martial assembled at such Port, and whether its Proceedings are invalidated by his Absence - 256

Page

No. X. — Whether a Court-Martial may legally proceed to Trial in the Absence of Senior Officers, who are present in Port, but detained with their Ships in Quarantine - - - - - - - 258

No. XI. — Whether the Act of endeavouring to desert to the Enemy justifies a Capital Punishment - - 260

No. XII. — As to the Time within which it is necessary to prefer the Complaint in order to justify a Court-Martial in taking Cognizance of it - - - 263

No. XIII. — Opinion of Mr. Jervis as to whether a Court-Martial can legally assemble and try Lieutenant Dobson, late of His Majesty's Ship "Brevdrageren," for an unnatural Crime, committed in September, 1809, but not reported until October, 1811, the accused having returned to this Country upwards of One Year - - - - - 265

No. XIV. — Whether the inadvertent Omission of the Date, in the Order to assemble a Court-Martial, do not render the Proceedings had in consequence thereof illegal - - - - - 265

No. XV. — Whether a Court-Martial has the Power to sentence an Offender to be transported, or imprisoned with hard Labour, or kept in solitary Confinement - - - - - - - 266

No. XVI. — In case of Murder, when the Wound is given, and the Party dies on board the Ship, the Body ought not to be subjected to a Coroner's Inquest - 267

No. XVII. — Case of Lieutenant Frye of the Marines, and the Consequences resulting from illegal Proceedings at a Court-Martial - - - 268

No. XVIII. — Form of Order to the second Officer in command to assemble a Court-Martial - - 271

No. XIX. — Memorandum to the Officer directed to preside - - - - - - 272

No. XX. — General Memorandum to the Captains and Commanders to attend the Court - - - 273

Page

No. XXI.—Order and Mode of Proceeding at a Naval Court-Martial - - - - - 273

No. XXII. — Instructions usually given to the Officer of the Court - - - - - 276

No. XXIII. — Form of Minutes of Proceedings at a Court-Martial - - - - - 276

No. XXIV. — Form of Sentence - - - 283

No. XXV. — Proceedings at the Trial of the Officers and Crew of a Ship lost - - - - 286

No. XXVI. — Officiating Judge-Advocate's Warrant - 289

No. XXVII. — Provost Marshal's Warrant - - 289

No. XXVIII. — Notice of Trial to the Prosecutor - 290

No. XXIX. — Notice of Trial to the Prisoner - 290

No. XXX. — Summons to Witnesses - - - 291

No. XXXI. — Warrant to the Captain of the Ship to which the Prisoner belongs for carrying the Sentence of Death into Execution - - - - 292

No. XXXII. — Order to the Provost Marshal to attend at the Execution of the Sentence - - 293

No. XXXIII. — Order to the Captain of the Ship to which the Prisoner belongs to make the signal for the Boats of the Squadron to attend at the Execution 293

No. XXXIV. — General Memorandum to the respective Commanding Officers to send Boats manned and armed to attend at the Execution - - - 294

No. XXXV. — Memorandum to be sent to each Captain on the Occasion of a sentence of Death being carried into Execution - - - - 295

No. XXXVI. — Order to the Captain of the Ship to which the Prisoner belongs to carry the sentence of Corporal Punishment into Execution - - 296

No. XXXVII. — Order to the Captain of the Flag Ship to cause the Signal to be made for the Boats of the Squadron to attend at the Execution of the sentence of Corporal Punishment - - - 297

Page

No. XXXVIII. — Form of Warrant to be issued by the Commander-in-chief to empower the Commander of a Squadron ordered on separate Service to hold Courts-Martial - - - - - 298

No. XXXIX. — Memorandum to accompany the preceding Warrant - - - - - 299

No. XL. — Certificate to be given by the President of the Court to the officiating Judge-Advocate - 300

No. XLI. — Certificate to be given by the President of the Court to the Provost Marshal - - 300

ERRATA.

Page 94. line 17., for "and" read "are."
107. delete "24th" in line 11., and supply it in line 13.
108. after line 10. from bottom, add "the 24th article of those who abet others in the embezzlement of stores;"
122. delete the second foot note.
151. note; for "XVI." read "XV."
154. note, for "I." read "XI."

ON THE

LAW AND PRACTICE

OF

NAVAL COURTS-MARTIAL.

INTRODUCTION.

Government of the Navy in former times. — Instructions issued by H. R. H. the Duke of York to Sir John Mennds in June, 1661. — Principal Laws now affecting the Naval Service.

It was not until 1661 that the legislature enacted special laws for the government of the Royal Navy, which had existed for upwards of 170 years before that period. In the second year of the reign of Richard II., when merchants and the Cinque Ports provided the sovereign with ships for war purposes, an Act of Parliament was passed, awarding a penalty of one year's imprisonment, and forfeiture of double the amount of wages received, for those mariners who "flee out of the service without license of the admirals or of their lieutenants."

By subsequent Acts, this crime was made punishable as felony, to be tried by the Lord-Admiral, or his deputies, or the justices of the peace in the county where the offence was committed. With the exception of desertion, all offences against the discipline of war were punished in former times according to the orders of the King in council, and even of the Admirals of England; but the declaration which had been made in the reign of Charles I., against the exercise of this prerogative, occasioned that authority to receive the sanction of Parliament by the Act 13 Chas. 2., cap. 9.: that Act was a general collection of the ordinances in use before, and may be considered as the foundation of martial law.

Prior to the passing of the Act 13 Chas. 2., all complaints made against persons in the fleet were referred for investigation to two or three of the senior officers, whose decisions were to be founded on the "*usages of war.*" The authority of these courts was defined and confirmed by this Act; they became legalised tribunals, with power to examine witnesses on oath; the crimes of which they might take cognizance, and the punishments to be inflicted on offenders, were clearly laid down: thus the social condition of both officers and men was raised to a proper standard; the law was exhibited in each ship, and read to the crew at certain times; the rules of discipline and war were condensed in a plain Act of Parliament, so that every man might know the laws to which he was amenable, and the

consequences that would accrue to him for a breach of those laws.

The following extract of instructions issued by H. R. H. the Duke of York, in June, 1661, to "Sir John Mennds, Knight, Captain of His Majesty's ship the 'Henry,' and Vice-Admiral and Commander-in-Chief of His Majesty's Fleet in the Narrow Seas," &c., may be of interest to the reader:—

"First, above all things, You are to provide that God be duly served twice every day in His Majesty's sayd ship, and in every other ship's company under your charge, according to the usuall prayers and liturgy of the Church of England.

"Secondly, You are to take care that all men employed under your command in this expedition, live orderly and peaceably together; and to cause every captain, master, and other officer, belonging to every ship and vessell in the fleet, faithfully to perform the duty of his place. And if any seaman or other in your ship shall commit murther or manslaughter, you shall send him in safe custody to the next gaole, where he is to be received and kept in safety, as the keepers will answer the contrary at their perills, untill he shall have his tryall according to law. And if any shall raise faction, tumult, or conspiracy, or shall quarrell, fight, or draw blood, or weapon to that end, or shall be a common swearer, blasphemer, railer, drunkard, pilferer, or sleep on his watch, or make noise, or not betake himself to his place of rest after the watch is sett, or shall not keep his cabin cleanly, or be dis-

contented with the proportion of victuals assigned unto him, or shall spoyle or waste them or any other necessary provision for the ship, or shall go on shore without leave, or shall committ any insolency or disorder, or be found guilty of any other crime or offence, you are to use due severity in the present punishment and reformation thereof without delay, *according to the known orders and customs of the seas;* and this strict course you are to cause to be duly exercised in your owne and in every other ship or vessell in the fleet," &c.

The principal laws now affecting the Naval Service will be found in the four following Acts of Parliament:

1st. 22 Geo. 2. cap. 33. (This act repeals the 13 Chas. 2. cap. 9.)

2nd. 19 Geo. 3. cap. 17.

3rd. 10 & 11 Vict. cap. 59.

4th. 10 & 11 Vict. cap. 62.

And the Queen's Regulations and Admiralty Instructions issued to the fleet in 1844.

CHAPTER I.

CONSTITUTION OF COURTS-MARTIAL.

Constitution of Naval Courts-Martial. — Commander-in-Chief has not, by virtue of his Office only, Authority to call and assemble Courts-Martial. — Under what Circumstances Commander-in-Chief may preside at a Court-Martial in Foreign Parts. — Senior Officers of Five or more Ships detached to be empowered to hold Courts-Martial. — Case of Commodore Johnstone and Captain Sutton. — When it may be improper for the Second Officer in Command to preside at a Court-Martial. — Commanders-in-Chief at the Home Ports may be ordered to preside at Courts-Martial. — Objections made to particular Officers as Members. — When Members are called upon to give Evidence. — When Officers under the Rank of Post Captain may constitute a Portion of the Court. — Officers receiving official Notification of Promotion. — Officers promoted by Commanders-in-Chief not to sit as Members until confirmed in their respective Ranks. — Lieutenants acting as Captains of rated Ships. — When two or more Captains are borne on the Books of one Ship. — Officers on Half-Pay, or doing Duty as Secretaries, not eligible as Members of a Court-Martial. — Admirals must have their Flags flying at the Port where the Court-Martial is assembled. — Captains must be present with their Ships to be eligible as Members. — Captains of Ships lost not eligible as Members. — Position to be occupied by Captains of the Fleet and Commodores of the First Class when attending as Members. — Cases where the Attendance of Members may be excused. — Officiating Judge-Advocate

to be appointed. — Court not to be adjourned over One Day. — When Circumstances prevent the Court from pronouncing Sentence. — Case of Captain Harris, of H. M. S. "Hussar." — Mode of proceeding at the Assembling of the Court. — Court not to be discharged from giving their Judgment.

IT is to be regretted that the several sections of the act 22 Geo. 2. cap. 33. (from 6. to 14.), which provide for the constitution of courts-martial, should be so ambiguously worded as, in many cases, to leave the meaning and intention of the legislature extremely difficult to define. In proceeding to the consideration of these sections, it may be well to remark, that the explanations which will be given, are in accordance with the usages of the service, — usages which are sanctified by time sufficient to make them binding in all future cases, unless it should appear that they are contrary to the spirit of the Act on which they are founded, or to the common law of the land.

Section 6. enacts, "That from and after the 25th day of December, 1749, the Lord High Admiral of Great Britain, or the commissioners for executing the office of Lord High Admiral of Great Britain for the time being, shall have full power and authority to grant commissions to any officer commanding in chief any fleet or squadron of ships of war, to call and assemble courts-martial, consisting of commanders and captains; and that in case any officer commanding in chief any fleet or squadron of ships of war (who shall be authorized

by the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral for the time being, to call and assemble courts-martial in foreign parts) shall happen to die, or be recalled, or be removed from his command, then the officer upon whom the command of the said fleet or squadron shall devolve, and so from time to time the officer who shall have the command of the said fleet or squadron, shall have the same power to call and assemble courts-martial as the first commander-in-chief of the said fleet or squadron was invested with."

This clause is clearly expressed and needs no comment, except that a commander-in-chief has not by virtue of his office only the power and authority to call and assemble courts-martial in foreign parts, but that power and authority must be vested in him by special warrant from the Lords Commissioners of the Admiralty, which warrant, if the commander-in-chief shall happen to die, or be recalled, or be removed from his command, is to be transferred to, and acted upon by, the officer who succeeds to the chief command of the fleet or squadron.

Sect. 7. — "Provided always, and it is hereby enacted and declared, that no commander-in-chief of any fleet or squadron of His Majesty's ships, or detachments thereof, consisting of more than five ships, shall preside at any court-martial in foreign parts, but that the officer next in command to such officer commanding in chief shall hold such court-

martial and preside thereat, any law, custom, or usage to the contrary notwithstanding."

This clause would authorise the commander-in-chief on a foreign station having under his command, *either actually present with him or on detached service*, fewer than five officers *qualified by rank* to sit as members, to preside himself at any court-martial assembled by his order. The numerous instances that have occurred where the proceedings of courts-martial have been pronounced by the law officers of the crown to be illegal in consequence of commanders-in-chief having sat as members, are where such commanders-in-chief have on the station under their command a sufficient number of officers *qualified by rank* to form a Court without them. It is, however, a subject deserving much attention, how far a commander-in-chief would be justified in presiding at a court-martial assembled by his order, in a case where he had, prior to issuing such order, investigated the particulars of the complaint by examining witnesses, thereby in a manner prejudging the facts, and probably hearing evidence of a character which he had no business to hear. And, further, whether he could consistently order the execution of a sentence of capital punishment awarded by a Court of which he was a member.

The term commander-in-chief in this section was evidently meant to apply not only as it is technically understood in the navy, but to all officers having the chief command of any number of ships *detached* from a fleet or squadron, and therefore

would include the senior officers of squadrons absent from the commander-in-chief. The word *detachment* must be considered as applicable to that portion of ships which has been detached or sent away from the fleet or squadron in charge of a senior officer. The words are imperative, "that no commander-in-chief of any fleet or squadron in foreign parts, consisting of more than five ships, shall preside at a court-martial." Now although a part of the fleet or squadron may have been detached by him, or separated from him by accident, yet such detachment, remaining subject to his command, is still part of his fleet or squadron. The true intent and meaning of this section appears to be, that a commander-in-chief on a foreign station, having under his command, either actually present or on detached service, five officers who by rank are eligible to sit as members of a court-martial, shall not preside at such Court.

Section 8. enacts, "That from and after the 25th day of December, 1749, in case any commander-in-chief of any fleet or squadron of His Majesty's ships or vessels of war in foreign parts shall detach any part of such fleet or squadron, every commander-in-chief shall, and he is hereby authorized and required by writing under his hand to empower the chief commander of the squadron or detachment so ordered on such separate service (and in case of his death or removal, the officer to whom the command of such separate squadron or detachment shall belong) to hold courts-martial

during the time of such separate service, or until the commander of the said detachment for the time being shall return to his commander-in-chief, or shall come under the command of any other his superior officer, or return to Great Britain or Ireland."

Section 9. provides, "That if any five or more of His Majesty's ships or vessels of war shall happen to meet together in foreign parts, then and in such case, it shall be lawful for the senior officer of the said ships or vessels to hold courts-martial, and preside thereat from time to time, as there shall be occasion, during so long time as the said ships or vessels of war, or any five or more of them, shall continue together."

We have seen by section 6., that the commander-in-chief of a fleet in foreign parts has not the power to call and assemble courts-martial, unless he has authority to that effect from the Lords Commissioners of the Admiralty; and, by section 8., that the commander of a detached squadron must be empowered by his commander-in-chief to hold courts-martial; it is not probable, therefore, that the legislature intended to vest the senior officer of five or more of His Majesty's ships, meeting by accident in foreign parts, with a power not possessed even by the commander-in-chief of a fleet unless under the authority of a warrant from the Admiralty; we are consequently led to infer that this section is meant to apply solely to an officer *specially ordered to try certain delinquents*, and that it merely provides that such officer, acting on the

special order referred to, may preside at the court-martial, notwithstanding he may be the senior officer at the port or place where the Court is assembled.

In proof of this view of the section in question, we may instance the memorable case of Commodore Johnstone and Captain Sutton, which occurred in 1787.

Early in the year 1782, Commodore Johnstone in charge of a squadron proceeding to the East Indies, encountered a French fleet at St. Jago, one of the Cape de Verde Islands, and not being satisfied with the conduct of Captain Sutton of the "Isis" in the action which ensued, placed him under arrest, and appointed another captain to the command of his ship. On arriving in the East Indies, Sir Edward Hughes, the commander-in-chief, declined ordering a court-martial for the trial of Captain Sutton: an appeal was subsequently made to the Admiralty, and on the 1st December, 1783, he was arraigned on the charges exhibited against him by Commodore Johnstone, and the Court pronounced sentence of honourable acquittal. On this Captain Sutton entered an action in the Court of Exchequer, and obtained a verdict, with 5000*l.* damages, which, on a new trial, were increased to 6000*l.* Commodore Johnstone then brought a writ of error in the Exchequer Chamber, which was argued before the Earl of Mansfield, Lord Chief Justice of the Court of King's Bench, and Lord Loughborough, Lord Chief Justice of the Court of Com-

mon Pleas, and their Lordships declared that the judgment of the Court of Exchequer ought to be reversed. This decision was afterwards confirmed by the House of Lords.

The main ground on which Captain Sutton rested his action was, that the Commodore had kept him under arrest for a longer period than was necessary, because he might and ought to have tried him at the time the offence was alleged to have been committed. The argument for the plaintiff in error on this point was as follows: —

"The 6th section of the Act 22 Geo. 2. cap. 33., gives the Lords Commissioners of the Admiralty power to grant commissions to any commanding officer to call and assemble courts-martial, consisting of commanders and captains. By this it appears that the power of assembling a court-martial is not necessarily incident to the office of a commander-in-chief, but must be derived from a commission to be granted by the Commissioners of the Admiralty. The averment is therefore bad, *that it was his duty as commander-in-chief to order a court-martial.* The plaintiff in error could not within this clause have the power to hold a court-martial without such commission. To enable him to hold a court-martial two things were necessary; 1st. That he had a commission giving him such authority: 2ndly. That there were a competent number of officers." *

* 1 D. & E. 511.

Lords Mansfield and Loughborough admitted the correctness of this argument, for in their judgment they remarked:

"As to the first averment, that by law it was incident to the duty of his office as commander-in-chief to hold a court-martial, now the contrary is manifest from the statute law of the land. The allegation is a proposition in law, and stands upon the record. It is false, and therefore the basis of the charge, that the defendant had authority, is wanting; and this objection we think fatal." *

Section 10. enacts, "That where any material objection occurs which may render it improper for the person who is next in command to the senior officer, or commander-in-chief of any fleet or squadron of His Majesty's ships or vessels of war in foreign parts, to hold courts-martial or preside thereat, in such case it shall be lawful for the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral for the time being, as also the commander-in-chief of any such fleet or squadron of His Majesty's ships in foreign parts respectively, to appoint the *third* officer in command to preside at or hold such court-martial."

The material objections which may render it improper for officers to sit at courts-martial, which will presently be considered, will of course be applicable as well to the president as to other members.

Section 11. empowers the Lords Commissioners

* 1 D. & E. 548.

of the Admiralty to appoint officers in the ports of Great Britain or Ireland to hold courts-martial.

Section 12. enacts, "That from and after the 25th day of December, 1749, no court-martial, to be held or appointed by virtue of this present Act, shall consist of more than thirteen, or of less than five persons, to be composed of such flag-officers, captains, or commanders then and there present, as are next in seniority to the officer who presides at the court-martial."

Section 13. enacts, "That nothing herein contained shall extend, or be construed to extend, to authorize or empower the Lord High Admiral, or the commissioners for executing the office of Lord High Admiral, or any officer empowered to order or hold courts-martial, to direct or ascertain the particular number of persons of which any court-martial to be held or appointed by virtue of this present Act shall consist."

Section 14. enacts, "That in case any court-martial shall, by virtue of this Act, be appointed to be held at any place where there are not less than three, nor yet so many as five officers of the degree and denomination of a *Post Captain*, or of a superior rank, to be found, then it shall be lawful for the officer at the place appointed for holding such court-martial, who is to preside at the same, to call to his assistance as many of the commanders of His Majesty's vessels, under the rank and degree of a post captain, as, together with the post captains then and there present, will make up the number of five, to hold such court-martial."

It appears to have been the intention of the legislature, that courts-martial should, as far as possible, be composed of the senior officers of the fleet. The Act makes no provision for the exclusion of members generally on any account,—it merely provides that where it shall be improper for the officer next in command to the senior officer to hold courts-martial in foreign parts, the officer third in command is to preside. Neither the prosecutor nor the prisoner have any legal right to challenge a member of the Court; but this privilege has always been allowed the prisoner, not to the full extent as in the courts of common law, but on good and sufficient reasons adduced. The proper time for objecting to any particular member or members is prior to the Court being sworn, — the reason for so doing must be on the ground of prejudice or interest. A prisoner might object to any man sitting as his judge, who had shown animosity towards him; or who had, before the trial, expressed a decided conviction of his guilt; or was so interested in the issue as might bias his judgment in the opinion he would be called upon to give. If any member had sat at a court of inquiry on the matter about to be tried by court-martial, he might with propriety be objected to, for besides his having given his opinion on the case, he must have heard the evidence of witnesses, not delivered on oath, and it cannot be supposed that he could altogether divest his mind of the impressions such evidence may have caused. On this objection being made, the Court have usually decided, that

when the officers who have composed a previous court of inquiry have given an opinion in their report adverse to the prisoner, they should not sit as members of the court-martial; but otherwise, if they have not given any such opinion. A grand-juror cannot sit as one of the petty jury on the indictment of a person against whom he has found a true bill; and the case of officers sitting as members of a court-martial, for the trial of persons whom they have previously judged at a court of inquiry, may be considered analogous. Another fair objection would be, that the party was under twenty-one years of age, and therefore, in consideration of law, an infant. We find, that by the wisdom of the common law, an infant cannot be a juror; and we therefore think it may be presumed, that the legislature, in constituting courts-martial, did not intend that a person incapable of being a juror at the common law should be capable of acting in the capacity both of judge and juror upon a court-martial. In May, 1802, Lieutenant P. Fothell, of the Royal Marines, serving on board His Majesty's ship "Venus," was tried by court-martial for disobedience of orders, and sentenced to be placed at the bottom of the list of first-lieutenants. Mr. Fothell appealed to the King in Council against this sentence, on the ground that Captain Robert Fanshawe, one of the officers composing the court-martial, was, when a member of the Court, under the age of twenty-one years. The law officers of the crown being desired to give their opinion whether, supposing the circumstance

stated by Mr. Fothell to be correct, the proceedings and sentence of the Court should be considered legal, pronounced the sentence void and the proceedings illegal. A member could not be objected to on the ground that he "had sat at a previous court-martial, on the trial of either a prosecutor or prisoner, implicated in charges connected with each other, or of a recriminating nature." * It is difficult to imagine on what ground an objection could be sustained on account of interest. †

It has happened in our criminal courts that the presiding judges have been called upon to give evidence; but, after doing so, they have not resumed their seats on the bench during the trial: the same course ought, in certain cases, to be observed at courts-martial. If a member be called as to character, or to prove or disprove any immaterial point, it would not be necessary that he should afterwards withdraw from the Court; but if the fact to which he deposes be material, as tending to the proof of the guilt of the accused, it would be better that he should not sit in the capacity of judge after giving his evidence, provided a sufficient number of members remained to constitute a Court: if it were otherwise, and the Court could not proceed without his assistance, he must resume his seat; for the law directs that the proceedings shall not be delayed. A crime might be committed in the presence of all the captains and commanders in the fleet: surely, in such

* M'Arthur, vol. i. p. 276.

† *Vide* Appendix, No. III.

a case, it could not be said that those captains and commanders would not be competent to try the offender. "The judges of the Court and the jurors may be sworn as witnesses for any of the parties; for they can have no interest in the issue of the trial, and no bias of any kind to give evidence against the truth."* It is only when the Court decide that the objections raised by the prisoner are of such a nature as to render it inconsistent with right and justice that a member should sit in judgment on the matter in issue, that the Court should dispense with his presence at the trial. †

It need scarcely be remarked, that neither the prosecutor nor prisoner can sit as members of the Court. That no man can be a judge in his own cause, is such a rule of justice, that Lord Hobart asserts it to be more binding than even an act of parliament.

A court-martial cannot consist of more than thirteen, or of less than five, persons, and must be composed of such flag-officers and captains, "*then and there present*," as are next in seniority to the officer who presides; but when there are only three officers of the rank of flag-officer or captain, the two senior commanders of the ships present are to constitute a portion of the Court to make up the number of five. A third commander sitting as a member of a court-martial, under any circumstances, would render the proceedings illegal. ‡ A

* Blackstone's Comm.

† Queen's Regulations, chap. vii. art. 5., p. 78.

‡ *Vide* Appendix, No. VI.

commander acting in the capacity of captain can sit only in the rank in which he is confirmed. A lieutenant acting as commander cannot sit as a member of a court-martial; and a commander acting as captain cannot sit if his place could be occupied by a commander of a ship present whose commission bears date anterior to the commander's commission of the acting captain.

If a captain being in command of one of Her Majesty's ships abroad should receive official notification from the Admiralty, or the commander-in-chief of the station on which he is serving, of his having been promoted to the rank of flag-officer, he is, during the sitting of a court-martial, to hoist his proper flag and to take rank thereat accordingly. Commanders receiving official information in the manner above described, of their promotion to the rank of captain, are to take their seats at courts-martial according to their seniority as captains.*

Commanders and lieutenants promoted by commanders-in-chief abroad cannot sit as members of a court-martial in the rank to which they have been so promoted, unless they have received official notification from the Admiralty of confirmation in their respective ranks.† Admirals upon foreign stations are directed to fill up vacancies occasioned

* Admiralty Circular, No. 17., July, 1846. This circular makes no provision for lieutenants who may have received official notification of their promotion to the rank of commander, sitting as members of a court-martial.

† *Vide* Appendix, No. IV.

by death, and although their Lordships always grant commissions to officers appointed to such vacancies, yet the law officers of the crown have given it as their opinion, that persons so promoted are not legally competent to sit at courts-martial as possessing the rank to which they are so advanced abroad, until they have been confirmed in that rank by the Lords Commissioners of the Admiralty.

A lieutenant appointed by a commander-in-chief to act as captain of a rated ship in a vacancy, to which the commander-in-chief would have been authorised to promote a commander to be a post captain, may sit as a member of a court-martial according to his seniority as a commander.*

Where there are two or more officers borne on the books of one of Her Majesty's ships for full pay, who by rank and seniority are entitled to sit as members of a court-martial (which is frequently the case in surveying vessels, &c.), they should take their seats accordingly, provided the ship in which they are borne is actually then and there present at the place where the court-martial is held.

Captains and commanders on half pay, and having no executive duty to perform, but being on board Her Majesty's ships in the capacity of secretaries to flag officers, &c., are not eligible to sit as members of a court-martial.

It has occurred in several cases that admirals and captains have been sent for from distant places

* Queen's Regulations, art. 2., p. 11.

to sit as members of courts-martial. Such admirals, however, must have their flags flying on board some ship in commission where the court-martial is assembled; the presence of their respective squadrons is not necessary. An admiral's authority is derived from the commission which directs him to hoist his flag, and in whatever ship that flag is displayed it affords *primâ facie* evidence of his being in actual service and full pay, and therefore, according to his seniority, eligible to sit as a member of a court-martial. A captain's commission is for one particular ship, and unless that ship be present at the place where the court-martial is held, he cannot sit as a member: for instance, it would not be lawful to order a captain to leave his ship at Plymouth, and proceed to Portsmouth, there to be borne on the books of a ship as a supernumerary, for the purpose of sitting as a member of a court-martial; the words "*then and there present*," which are found in the 12th section of the Act 22 Geo. 2. cap. 33., are evidently intended to apply to the presence of the ships to which the members belong. But an admiral might be ordered to leave his squadron at Plymouth and hoist his flag in any vessel in commission at Portsmouth, and then legally sit as a member of a court-martial; nor would such order be a violation of the 13th section of the Act referred to, wherein it is enacted, that neither the Lords Commissioners of the Admiralty, nor the officer appointed to hold courts-martial, shall direct or ascertain the parti-

cular number of persons of which the Court is to consist; this clause is only intended to deprive them of the power of directing that any particular flag-officers or captains shall not sit, who by rank and seniority are entitled to do so.

On the trials of Admiral Keppel and Vice-Admiral Sir Hugh Paliser, the flag-officers of the fleet who were commanding at the Nore, in the Downs, and at Plymouth, were chosen by the Lords Commissioners of the Admiralty to be at Portsmouth in a situation to sit as members of the courts-martial, by directing them to repair thither and hoist their flags on board of some particular ships named for that purpose.*

Although by the 21st section of the Act it is enacted, that all the command, power, and authority given to the officers of His Majesty's ships, shall remain and be in full force in the event of their ships being lost, until they shall be regularly discharged from the service, or removed into other ships of war, or until a court-martial shall be held to inquire into the causes of the loss of the said ships, the captains and commanders of such ships are not eligible to sit as members of courts-martial, according to the provisions of the 12th section of the Act, which, as before observed, is applicable only to officers commanding ships *then and there present where the Court is assembled.* †

Captains of the fleet and commodores of the

* M'Arthur, vol. i. p. 230.
† *Vide* Appendix, No. VII.

first class take their seats at courts-martial next below the junior rear-admiral, and vote accordingly. This rule, however, does not extend so far as to apply to these officers being president of the Court, unless their seniority entitles them to be so; neither can they sit as members of a court-martial if there should happen to be a sufficient number of senior officers present to constitute a full court without them; it is only when they are called upon to act that they are to occupy a position above that which their mere seniority as captains entitles them to. If the captain of the fleet be a flag-officer, he takes precedence at a court-martial accordingly.*

All doubts that may have existed as to the power of the Courts to dispense with the attendance of members *in cases of sickness, or other extraordinary and indispensable occasions* †, are removed by the 2nd section of the Act 19 Geo. 3., cap. 17., which provides "That the proceedings of any court-martial shall not be delayed by the absence of any of its members, provided a sufficient number doth remain to compose such Court, which shall and is hereby required to sit from day to day (Sunday always excepted) until the sentence be given; anything hereinbefore contained to the contrary thereof in anywise notwithanding. And no member of the said court-martial shall absent himself from the said Court during the whole course of the trial, upon pain of being cashiered from His Majesty's service, except in case of sickness, or

* *Vide* Appendix, No. V. † App. No. I.

other extraordinary and indispensable occasion, to be judged of by the said Court."

Sickness, of course, is a valid reason for the non-attendance of an officer who, by his rank and seniority, ought to sit as a member of the court-martial; on this plea, the evidence of the surgeon should be required on oath, and if he asserts that the attendance of his patient would endanger his life, or even that his health would suffer thereby, the Court could not hesitate to dispense with his presence. It might also be considered a good and sufficient reason for dispensing with the attendance of a member, at any stage of the proceedings, that his presence was required on board his ship, to rescue her from a position of great danger,—always provided a sufficient number of officers remained to constitute a Court, — or that an emergency of the public service required a ship in a distant place. In the year 1777, a case was submitted to Mr. Thurlow with reference to members absenting themselves from a court-martial after the trial is begun, on which he remarked: "A commander-in-chief would not choose to interrupt a court-martial, without a pressing occasion; but if such occasion should require the service of a member, I should advise the commanding officer to order it accordingly."

Every flag-officer and captain in sight, whether within or without the limits of the port, should obey the signal to go on board the ship where the court-martial is ordered; it will then be for the

Court to consider whether the reasons that may be adduced by any of them are of that extraordinary and indispensable nature, as to authorise their non-attendance as members; the fact of their being under sailing orders, and *about to depart*, has been held to be not a sufficient reason. But a Court may be assembled and legally proceed in the trial of any person, in the presence of senior officers detained in quarantine, who, by law, are prohibited from holding intercourse with others who are not in quarantine. If a flag-officer or captain should arrive *after* the Court is sworn, such flag-officer or captain would not be required as a member thereof; the provisions of the act being fulfilled by the attendance of the qualified officers present at the time when the Court is formed.*

In the absence of the Judge-Advocate and his deputy, the president, with the concurrence of the members of the court-martial, appoints some person to fill the office; a notification to the person intended for this duty should be given immediately the court-martial is ordered, so that the summonses for the attendance of witnesses, a copy of charges to the prisoner, and notice to the prosecutor, may be issued in due time.

The usual hour for the Court to assemble is nine o'clock in the morning:—by the 2nd section of the Act 19 Geo. 3., cap. 17., they are required to sit from day to day (Sunday always excepted) until the sentence be given; the adjournment of the

* *Vide* Appendix, Nos. IX. and X.

Court *over one day* would render the sentence void and the proceedings illegal. If anything should occur to prevent the court-martial from proceeding to sentence, the Court must of course be dissolved, and the prisoner may be brought to trial the first convenient opportunity afterwards. In November, 1823, a court-martial was held at Plymouth on Captain Harris, of His Majesty's ship "Hussar," for disobedience of orders; owing to the sudden illness of the president, who subsequently died, the Court, after adjourning from day to day for want of a sufficient number of members, dissolved itself:—another court-martial was consequently ordered to assemble for the trial of Captain Harris, at which he was most honourably acquitted.

If a member of a court-martial, after being sworn, is excused from attendance, on any ground, he must resume his seat whenever the cause for which he was excused shall have ceased. So, in case of sickness, the evidence of the surgeon will be required at each sitting of the Court.

At naval courts-martial the officers composing the Court take their seats thereat according to their respective rank and seniority, as follows:—viz. 1, 3, 5, 7, 9, 11, on the right of the president; 2, 4, 6, 8, 10, 12, on the left of the president. The president sits at the head of the table; the Judge-Advocate at the bottom; the prosecutor stands on the right of the president; the prisoner behind, and the witness under examination, on the right of, the Judge-Advocate.

As soon as all the members, together with the prosecutor and prisoner, are present, and the audience admitted, the Judge-Advocate, by direction of the president, calls over the names of the members of the court-martial, and of the witnesses, and reads aloud the order for assembling the Court; he then hands his warrant of appointment to the president for signature, and it also is read; after which it is his duty to administer to each of the members the oath prescribed in the 3rd section of the Act 10 & 11 Victoria, cap. 59. The president must afterwards administer to the Judge-Advocate the oath enjoined by the same Act.

It is usual for the court-martial to assemble on board the ship to which the president belongs; it may be held, however, in any ship in commission; it cannot take place on shore without the authority of a special Act of Parliament. Such an Act was passed in the year 1779, to authorise the Lords Commissioners of the Admiralty to adjourn the court-martial to be held for the trial of Admiral the Honourable Augustus Keppel to such convenient place on shore as their Lordships might deem necessary or expedient. This Act, though expired, is inserted in the Admiralty Statutes as a precedent. (19 Geo. 3. cap. 6.)

When the Court has once been assembled and sworn according to Act of Parliament, they cannot be discharged from giving their judgment upon the case before them; neither the Admiralty nor the person who ordered the court-martial can au-

thorise the conclusion of the trial before its natural period; but a writ of prohibition from the Court of Queen's Bench directed to the members of a court-martial, commanding them to cease their proceedings, must be obeyed.*

* For cases illustrative of the constitution of courts-martial, see Appendix, from No. I. to No. X.

CHAP. II.

FORMS OF PROCEEDING IN NAVAL COURTS-MARTIAL.

Period within which Complaints must be made in Writing.— Prisoner to be furnished with a Copy of the Charges. — Mode of Proceeding when the Court is sworn. — All Evidence to be given on Oath.

No charge or complaint against any person can be taken cognizance of at a naval court-martial, unless the same be made in writing* to the Lords Commissioners of the Admiralty, or to the commander-in-chief of the squadron to which the offender may belong, and within three years of the committal of the offence, or within one year after the return of the ship, or of the squadron, in which the offender may have been serving, into any of the ports of Great Britain or Ireland, or within one year after the return of the offender to Great Britain or Ireland. But if the complaint be made within three years after the committal of the offence, a court-martial may legally proceed to trial, notwithstanding the party accused may have returned more than one year into any of the ports of Great Britain or Ireland before such complaint was made. The time, therefore, for commencing a prosecution for a breach of the naval articles of

* Queen's Regulations, chap. vii. art. 2., p. 77.

war is limited by statute; but should an offender fly from justice, he would be precluded from all the advantages of the limitation, and subject to trial at any period whenever his arrest might be effected.*

Except in cases of mutiny, or under such other pressing circumstances as might render delay inexpedient to the public service, the prisoner must be furnished with a copy of the charges or complaints against him at least twenty-four hours prior to the commencement of the trial†; an omission on this point would render the proceedings invalid. This indulgence is not generally granted in our criminal courts. "At the Old Bailey, a copy of the indictment cannot regularly be obtained without an order from the court; and it is a common practice, on the circuits, to apply to the court for a copy at the time of the trial. This practice appears to have been first adopted at the Old Bailey, in pursuance of an order made by some of the Judges for the regulation of those sessions in the 26th year of Charles II. It was then ordered 'that no copies of any indictment for felony be given without special order, upon motion made in open court at the general gaol delivery, for the late frequency of actions against prosecutors, which cannot be without copies of the indictment, deterreth people from prosecuting for the king upon just occasions.'"‡

* *Vide* Appendix, Nos. XII. and XIII.

† Queen's Regulations, chap. vii. art. 3., p. 77.

‡ 2 Phillips's Law of Evidence, 175.

The prisoner is not entitled to have a previous communication made to him of the written evidence by which the charge or charges against him are to be proved.

The court-martial being formed, the charge or complaint against the prisoner must be read aloud by the Judge-Advocate, after which the witnesses, with the exception of the one whom it is intended first to examine on the prosecution, are to be directed to leave the Court.

The evidence of all witnesses must be given on oath, administered by the Judge-Advocate *; there can be no deviation to this rule; the sovereign of the realm could not give evidence in a court of law, unless sworn. The witness in his oath appeals to the Almighty for the truth of the statement he is called upon to make; as he hopes for His help, he declares the veracity of the evidence he shall give, and calls on himself the vengeance of God if his testimony should be false. †

"The substance of the oath must always be the same, though the form in which an oath is taken varies in different countries, and according to different forms of religion." "Christians are sworn on the New Testament, Jews on the Old Testament, Mahometans on the Koran, and persons of other religions according to the form prescribed for that purpose by the religion they profess; Christians are sworn with their hats off — Jews

* Queen's Regulations, chap. vii. art. 7., p. 78.

† 1 Phillips, 8.

with their hats on. Even among the different sects of Christians, there may be a variance in the manner of taking the oath; a Scotch Covenanter, for instance, instead of kissing the book, as is done by other sects of Christians, holds up his hands, whilst the book lies open before him. Each witness, in short, swears in the particular form prescribed by his religion; the only general rule that can be laid down upon the subject is, that the oath be such as the witness deems obligatory upon his conscience; and it is expressly declared by the Statute 1 & 2 Victoria, cap. 105., that, in all cases in which an oath may lawfully be administered, the party is bound by the oath administered, provided it have been administered in such form and with such ceremonies as he may declare to be binding; and that, in case of wilful false swearing, he may be convicted of perjury, in the same manner as if the oath had been administered in the form and with the ceremonies most commonly adopted. A witness may be asked, after he is sworn, whether he considers the oath he has taken obligatory upon his conscience; but, if he answer in the affirmative, his answer is conclusive, and he cannot further be asked whether there be any other mode of swearing more binding upon his conscience than that which has been used."*

It was formerly the practice of our courts of law to reject the evidence of Jews and infidels; it was found that a prohibition of such a nature materially

* Archbold's Pleading and Evidence in Criminal Cases, 154.

affected the course of justice; it is now usual to receive the evidence of all persons of whatsoever creed, denomination, or sect, given on oath, or affirmation, or under such forms as they consider binding on their consciences. It is, however, indispensable that they should believe in the existence of a Supreme Being, and in future rewards and punishments. To establish the incompetency of a witness, it is not sufficient to show that he holds crude and irrational ideas on points of religion: it must be made apparent, that he neither believes in the existence of God, nor dreads punishment hereafter, should he speak falsely: the proper time for questioning a witness on these subjects is before he is sworn, but he may not be interrogated as to the particular tenets of his religion.

"By the statutes 9 Geo. 4. cap. 32. sect. 1. and 3 & 4 Geo. 4. cap. 49., a Quaker or Moravian, required to give evidence in a criminal case, may, instead of taking an oath in the usual form, be permitted to make a solemn affirmation or declaration in these words: 'I, A. B. do solemnly, sincerely, and truly declare and affirm,' &c., which has the same force and effect in all courts of justice and other places where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form. And if any person making such affirmation or declaration shall be convicted of having wilfully, falsely, and corruptly affirmed or declared any matter or thing, which, if the same had been sworn in the usual form, would have

amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures to which persons convicted of wilful and corrupt perjury are subject. The same rule is now by statute 3 & 4 Will. 4., cap. 82., applicable to the denomination of Christians called *Separatists;* and by statute 1 & 2 Vict. cap. 77., to any person who *shall have been* a *Quaker* or a *Moravian;* it having been held that a person formerly a Quaker who had seceded from that sect on some point of doctrine, retaining their opinions on the unlawfulness of swearing, but refused to affirm under the forms given in the 3 & 4 Will. 4. cap. 49. and 3 & 4 Will. 4. cap. 82., was not admissible as a witness in a criminal case on making the affirmation according to the 9 Geo. 4. cap. 32."*

* Archbold, 155.

CHAP. III.

EVIDENCE.

Evidence in general. — The best Evidence that can be had to be produced. — Written Documents, how to be received in Evidence. — One Witness generally sufficient. — Case of Lieutenant W. Jones, commanding H. M. S. "Race-horse." — Prosecutor a competent Witness. — May conduct the Prosecution after giving his Evidence. — Case of Captain Thompson, of H. M. S. "Edgar." — Trial not to be postponed.

We shall now endeavour to lay before the reader a brief outline of the rules by which our courts of law are governed in receiving and rejecting the evidence submitted in criminal cases: by these rules it is right that the members of naval courts-martial should be guided, for they have been established by the wisdom of ages,—their end being to obtain such true knowledge of facts as may enable the judges to administer justice with fairness to all parties. In a case, civil or criminal (not capital), if a verdict has been given where improper evidence has been received, a new trial is granted, and that even where, in the opinion of the Court, the jury might have been warranted in finding the same verdict upon the unobjectionable parts of the evidence, with-

out having recourse to such parts as were irregularly admitted. In cases of conviction for capital offences, where by law there can be no second trial, the sentence is never carried into execution if improper evidence has been received. If it should be said the members of a naval court-martial are judges as well as jurors, we answer they are so undoubtedly, but having performed their functions of judges in regulating their proceedings and determining on the admissibility or rejection of evidence, their functions with respect to the facts, and the conclusion to be drawn from those facts, is precisely the same with that of other jurors. The Law, and the Judge the organ of the Law, will not trust a jury, in a common case, to hear evidence not legally adduced or applicable to the charge; and if, by mistake or inadvertence, they have heard what ought to have been excluded, a verdict founded on such materials is not permitted to stand or to be acted upon. And what is the reason for this anxious caution? — because otherwise the verdict might be founded on prejudice excited by what ought not to have been heard, and not built, as it should be, upon the legitimate evidence in the case. We are not recommending or expecting that naval officers should be skilful lawyers: the observations here suggested appear to accord with the plainest rules of natural universal justice, unshackled, as it should be, by any technicalities.

No man will suspect that honourable and gallant officers, on whom the principal duty of prosecuting

is cast, frame their questions purposely with a view to influence the witness; but the authority which belongs to their character and station, particularly where, as it must often happen, the witness is himself a prisoner under accusation, appears strongly to recommend the adoption of the most unobjectionable mode of bringing the evidence before the Court.

Evidence may be classed under the four following heads: —

1. Confessions.
2. Presumptions.
3. Written Evidence.
4. Parol Evidence.

The prosecutor is bound to produce the best evidence that can be had to substantiate the charges against the prisoner. Should he bring before the Court only secondary evidence, he must explain the causes which prevent him from producing primary proofs of the guilt of the party accused. If a person were charged with writing a letter to his superior officer, containing expressions of disrespect, and only a copy of the letter were submitted to substantiate the fact, it would not be right to give judgment against the accused, unless it should be shown that the original document was lost or destroyed, or that it had been forwarded by the prosecutor to his superior officer and not returned. The authenticity of the copy must be proved. If the original document should be put in, it, or the signature attached to it, must be

proved to be in the handwriting of the accused, or written by his direction: the delivery also should, if possible, be proved. It will be necessary to use the utmost caution in receiving copies of documents submitted as evidence; and the Court should invariably reject them when the originals might have been obtained: they should also carefully consider the reasons that may have induced the prosecutor to withhold the primary evidence, and the probable disadvantage to the prisoner's defence by its non-production.

At common law, one witness is sufficient in all cases, except perjury; and at courts-martial one witness, if the Court believe him, is sufficient to justify and support their sentence. But a court-martial could not, with propriety, proceed to inquire into the cause of the loss of a ship on the testimony of the Captain only. In 1777, the "Racehorse" sloop, commanded by Lieutenant William Jones, was captured by the rebels, and taken with her crew into Philadelphia. Lieutenant Jones was released; but the men belonging to the sloop were detained as prisoners. Mr. Cust, the solicitor of the Admiralty at that time, gave it as his opinion that a court-martial could not, with propriety, be convened to inquire into the particulars of the loss of the said sloop on the evidence of Lieutenant Jones, unsupported by other testimony.

The prosecutor is a competent witness, and has always been admitted as such at courts-martial.

After giving his evidence it is not necessary that he should withdraw from the Court.* The practice, on all occasions, has been to permit him to continue to conduct the prosecution. The following is a copy of a letter from Mr. Greetham, acting as Judge Advocate at Portsmouth, to Mr. Secretary Stephens of the Admiralty, dated Jan. 7. 1789:—

"Captain Thompson, commander of his Majesty's ship 'Edgar,' being directed by their Lordships to assemble a court-martial for the trial of Mr. Charles Thackeray, Lieutenant of his Majesty's ship 'Thorn,' on several charges exhibited in a letter from Captain W. Taylor her commander, to you, and among others, for going into the captain's cabin, when alone, at sea, and calling him 'scoundrel and liar;' which Captain Taylor can alone prove; and as Captain Thompson apprehends that the Court may have a doubt of the propriety of admitting Captain Taylor to give his evidence, because he is the complainant, he has directed me to state the case to you, and to request you to move their Lordships to lay the same before such counsel as they shall think proper, for an opinion on the following questions, viz.:—

"Whether Captain Taylor's evidence, under the above-mentioned circumstances ought to be admitted, or not? and if it ought to be admitted,—

"Whether, after he has been examined, as it is the custom of courts-martial to examine the wit-

* Queen's Regulations, chap. VII., art. 3., p. 79.

nesses separately and apart from each other, he can be permitted to remain in the Court to conduct the prosecution ?"

These questions were referred to Mr. Cust, who delivered the following opinion thereupon : —

" The distinction between objections to the competency and objections to the credit of a witness has been long established, and in criminal prosecution it is not a legal objection to the competency of a witness, or to the admissibility of his evidence, that he is the prosecutor, whatever objection to his credit may arise under the circumstances of the case.

" The effect of the evidence, when admitted, and the mode of conducting the prosecution, must be left to the judgment of the Court. If this practice of courts-martial in examining the witnesses separately *is so universal that it cannot be dispensed with in any case*, I suppose that some agent or attorney on behalf of the prosecutor may conduct the prosecution, which is every day's practice in courts of law.

" If any doubt should be conceived by the Judges of the Court on the propriety of receiving the evidence of a complainant, it may be proper to observe, that the rule which is universal in civil actions that a plaintiff cannot be admitted as a witness in his own cause, does not apply to criminal prosecutions, which are always to be at the suit of the Crown, and on the behalf of the public; and therefore objections from interest, or from want of other evi-

dence to confirm the testimony of a single witness, are objections only to the credit.

"The trial should not be postponed on the application of either the prosecutor or prisoner on the ground that certain witnesses are not forthcoming, unless it be made apparent to the Court that such witnesses are material to substantiate or refute the charges; that the party making the application has been guilty of no neglect in endeavouring to procure their attendance; and that, there is a probability of his being able to insure their presence on the day to which he prays the trial may be postponed; otherwise, it would not be right to delay the proceedings.

"If it is moved on the part of the prosecution in a case of felony to put off the trial on the ground of the absence of a material witness, who has not made a deposition before the committing magistrate, the Judge will require an affidavit stating what points the witness is expected to prove, in order that he may form a judgment as to the witness being material or not." (*Reg.* v. *Savage*, 1 C. & P. 795.)

CHAP. IV.

I. CONFESSIONS.

Evidence. — Confessions. — Not customary to call on the Prisoner to plead to the Charges. — A Confession can only affect the Person who makes it. — Evidence of Confession to be cautiously received. — Statements made to a Counsel or Attorney. — Confessions need not be made upon Oath.

It is not customary at naval courts-martial to call on the prisoner to plead to the charges preferred against him; the defendant must be presumed to be innocent until the contrary be proved. A full and unqualified confession on the part of the accused is perhaps the strongest evidence that can possibly be had to prove his guilt. No man would admit that he had perpetrated a crime which subjected him to punishment, unless he were really guilty; therefore, if a prisoner, in open Court, voluntarily confessed to the offences of which he stood charged, it would be competent in the Court to pronounce judgment at once, without further evidence. Such confession on the part of a prisoner would, generally, be viewed as a mark of contrition, and the Court probably, in many cases, would pass a more lenient sentence than if the charges had been proved by the evidence of witnesses.

Confessions of crimes against the articles of war are of two kinds: 1st. When the prisoner in open Court admits that he is guilty of the offence of which he is charged; 2nd. When the prisoner confesses his guilt, or any fact which may tend to prove it to any other person, or assents to what is said in his presence, or hearing relative to a fact within his knowledge.*

"No confession can be received as evidence, unless it be made voluntarily, and by the entire free will of the party accused. It may not be extorted by any promise of favour, or by menaces, or by undue terror. Thus, if it be said to the defendant, that it will be better or worse for him if he do or do not confess (2 East, P. C. 659.); or that what he says will be taken down, and used for him or against him on his trial (*Reg.* v. *Drew*, 8 C. & P. 140.); or even if a confession be procured by a threat, to take the defendant before a magistrate, if he do not give a more satisfactory account (*R.* v. *Thompson*, 1 Leach, 291.), or to send for a constable (*R.* v. *Richards*, 5 C. & P. 518.; *Reg.* v. *Sheam*, C. & Mar. 109.); or by saying, 'tell me where the things are, and I will be favourable to you;' or 'you had better tell me all you know;' or, 'you had better tell me where you got the property;' or, 'you had better split, and not suffer for them all;' or, 'it would have been better for you if you had told at first;' or, 'I should be obliged if you could tell us all you know about it,' 'if you will not, of course

* Archbold, p. 115.

we can do nothing;' or, 'anything you can say inyour defence we shall be ready to hear;' and a confession with a view and under the hope of being thereby permitted to turn Queen's Evidence, or of obtaining a pardon or reward, has been holden inadmissible. To exclude a confession made under the influence of a promise or threat, the promise or threat must be of a description which may be presumed to have such an effect on the mind of the defendant as to induce him to confess; and therefore an exhortation, admonition, promise, or threat, proceeding at a prior time from some one who has no concern in the apprehension, prosecution, or examination of the prisoner, but interferes without any authority, will not be sufficient to render a confession inadmissible. In a recent case it was stated that it is the opinion of the Judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority; and that if a person not in any office or authority hold out to the accused party an inducement to confess, this will not exclude a confession made to that party: the inducement must refer to a temporal benefit, for hopes that are referrable to a future state merely are not within the principle which excludes confessions obtained by improper influence. The only proper question is whether the inducement held out to the prisoner was calculated to make his confession an untrue one; if not, it would be admissible." *

* Archbold, p. 111. 117.

"The circumstance that some deception has been practised in order to obtain a prisoner's confession, will not render it inadmissible in evidence." "Thus, when a prisoner asked the turnkey if he would put a letter in the post, and upon his promising to do so, gave him the letter; it was detained by the turnkey, and given in evidence as a confession. In another case artifice was used to induce a prisoner to suppose that some of his accomplices were in custody, under which mistaken supposition he made a confession; and it was admitted in evidence. In another, when a constable, in order to extract a confession, assumed the prisoner's guilt, asking her how she came to poison her uncle, a confession made in answer was admitted." *

A confession cannot affect any one but the person who made it; but the dying declarations of an accomplice were holden by the Judge to be good evidence against the principal; and the majority of the Judges were of opinion that this evidence would of itself be sufficient to convict, although the testimony of the accomplice, if living, would not, unless corroborated by other evidence. †

Although a person should while in a state of drunkenness make a confession, it would not, on that account, be inadmissible; but the Court would decide as to the weight which a statement made in such a circumstance ought to carry with it.

Evidence of confession should be very cautiously received and carefully considered: it should always

* 1 Phillips, 405. † Archbold, 122.

be borne in mind the proneness that people have to exaggerate statements respecting crimes of great magnitude; the almost impossibility of repeating the exact expressions of the party confessing; the probability that the words selected by the witness might have a different meaning to that which the prisoner intended to convey in his own statement; the likelihood of mistakes arising from defective memory; and the fact, that in the case of a confession not being made in the presence of a third party, the witness is not deterred from speaking falsely by any dread of the penalties awarded for the crime of perjury.

Statements made to a counsel, attorney, or solicitor, engaged in the trial, cannot be used as evidence in a court of justice; but they may be examined as to facts within their knowledge with which they have become acquainted, otherwise than from any confessions or admissions made by the accused to them in their professional capacity.

It is not necessary that a confession of a party accused should be made upon oath to authorize the Court in receiving it in evidence against him.

CHAP. V.

II. PRESUMPTIONS.

Evidence. — Presumptions. — Presumptions in Law. — Sir Mathew Hale on Presumptive Evidence.

PRESUMPTIVE evidence means the relation of facts not precisely of the matter in issue, but of such a nature as may reasonably lead the jury to a correct elucidation of the acts and intentions of which the defendant stands charged.

Thus, if a man have a quarrel with another, and threatens his life, and shortly afterwards meets him in a wood and knocks his brains out with a stick, and it subsequently be proved that the stick in the possession of the defendant had marks of blood on it, and from the appearance of the wound it was probable that such a weapon had been used to inflict it; then, in the absence of satisfactory explanations on the part of the prisoner, a jury might reasonably infer that the deceased had met his death by the hand of the accused, and would, in all probability, convict a man on such evidence. Presumptive evidence should be admitted and considered in proportion to the difficulty of substantiating the facts in issue by direct evidence.

The disgusting crimes specified in the twenty-

ninth article of war would generally be proved by circumstantial evidence; for the perpetrators would select such time and place for the committal of their atrocities as would render it almost impossible to prove the facts by direct evidence.

If goods be stolen and found within a reasonable time in the possession of a party not the rightful owner, it may be inferred that he was the person who stole them.

"No person is to be required to explain or contradict until enough has been proved to warrant a reasonable conclusion against him in the absence of explanation or contradiction; but when such sufficient proof has been given, and the nature of the case is such as to admit of explanation or contradiction, human reason cannot do otherwise than adopt the conclusion to which the proof tends, if no explanation or contradiction is offered. *

There are several presumptions in law, viz.:—

1. A defendant is deemed innocent until the contrary be proved.

2. Every man contemplates the probable consequences of his acts, and is therefore responsible for them.

3. When an act is done injurious to an individual, malice is presumed in the person committing the act.

4. Killing is considered murder, until accident or necessity be proved by the defendant.

Sir Mathew Hale lays down two rules necessary

* 2 Phillips, 436.

to be observed with regard to circumstantial evidence: —

1st. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods.

2nd. Never to convict any person of murder, or manslaughter, till at least the body be found, on account of two instances he mentions, when persons were executed for the murder of others who were then alive, although missing.*

Archbold, 124.

CHAP. VI.

III. WRITTEN EVIDENCE.

Evidence. — Written Evidence. — Written Documents to be placed before the Court entire. — Written Evidence to be produced whenever it can be had. — Acts of Parliament printed by the Queen's Printer allowed as Evidence. — Prosecutor and Prisoner entitled to call on each other to produce documentary Evidence.

It is not competent in either party to extract a particular passage from any letter or writing to be used as evidence: the document must be placed before the Court entire. Papers written or signed by the prisoner may be used against him, and received in evidence as admissions on his part.

Whenever written evidence can be had to substantiate a fact, it must be produced, and oral evidence should not be allowed in lieu thereof. If it be necessary to examine a witness on a letter supposed to have been written by him, he must be asked whether it is in his handwriting, and if he acknowledge it, he cannot be questioned as to its contents; but the letter must be read and put in evidence; and the opposite party has a right to use it to frame his questions in the cross-examination. Copies of Acts of Parliament and the Articles of War, purporting to be printed by the Queen's

Printer, are allowed as evidence of such acts and articles.

A prosecutor may call on the prisoner to produce certain documents in his possession, — such as orders, instructions, &c., — and which may be required as evidence to substantiate the charges. If the prisoner refuse to produce the original papers, the prosecutor may adduce parol evidence of their contents, and exhibit properly authenticated copies of such originals. So, also, the prisoner may require from the prosecutor such documents in his possession as may be considered necessary for the defence; and in the event of their being refused, he has the same privilege as the prosecutor of resorting to parol evidence and copies.

CHAP. VII.

PAROL EVIDENCE.

Evidence. — Parol Evidence. — Must be of Facts within the personal Knowledge of the Witness. — In Matters of Science. — Idiots and Lunatics. — Persons deaf and dumb. — Infants. — Witness not to be rejected on the Ground of Crime or Interest. — Evidence of Accomplice admissible. — Lord Chief Justice Holt on the Evidence of Accomplices. — Husband and Wife. — Persons cohabiting together, but not married. — Witness not bound to criminate himself. — In what Cases hearsay Evidence may be received. — Dying Declarations. — Evidence of seditious Speeches.

PAROL evidence cannot be received where there is written evidence to prove the facts in issue.

Parol evidence cannot be received of anything which is not within the personal knowledge of the witness: he must depose to facts that occurred within his presence or hearing; but in a matter of science a person may be called to prove the probable result of certain facts already proved.*

An idiot is not allowed to give evidence; neither is a lunatic, unless during a lucid interval. A person who is deaf and dumb may give evidence through a sworn interpreter who understands his

* Archbold, 142.

signs. An infant may be examined, provided he understands the sanctity and obligation of an oath. By the statute 6 & 7 Vict. cap. 85. sect. 1., it is provided that no person offered as a witness shall be excluded by reason of incapacity from crime, or interest, from giving evidence, either in person, or by deposition, according to the practice of the Court, on the trial of any issue found, or of any matter or question, or any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, or person, having by law, or by consent of parties, authority to hear, receive, and examine evidence; but every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation, in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence.*

The evidence of an accomplice is admissible, even although he should avow himself to have participated in the crime of which the prisoner stands charged; but the Court should hesitate to convict under such evidence unless it be supported by other testimony. It must here be remarked that the dis-

* Archbold, 143, 144.

tinction between a legal witness and a good one is a question for the members of the Court to decide, which every man will do according to the best of his judgment. Lord Holt, speaking of the evidence of accomplices, said, "Conspiracies are deeds of darkness as well as of wickedness, the discovery whereof can properly come only from the conspirators themselves; and the evidence of accomplices has been allowed good proof in all ages, and they are the most proper witnesses, for otherwise it is hardly possible, if not altogether impossible, to have a full proof of such secret contrivances." *

In some cases where the privacy of the offence renders it difficult of proof, it may be necessary to permit one of the offenders to be an evidence for the prosecution, on the express or implied condition that if he make a full and complete discovery of the particulars of the matter under investigation he shall not himself be subject to prosecution on account of the crimes he may have committed in connection with the prisoners. If the accomplice fail to make a fair and perfect disclosure, he loses his claim to protection, and remains liable to be tried and punished. Although in a strictly legal point of view, the evidence of an accomplice is alone sufficient to warrant a conviction, the just and merciful practice in criminal courts is not to convict a prisoner unless such evidence be confirmed by other and less objectionable testimony.

A husband may not give evidence in a case af-

* 1 Phillips, 27.

fecting his wife; neither may a wife give evidence in a case affecting her husband: there are a few exceptions to these rules, but they are immaterial in the cases likely to be brought under the cognizance of courts-martial. Parties cohabiting together, but not actually married, are competent witnesses for or against each other. Evidence of relations (except husband and wife) for or against each other is admissible. A witness is not bound to give evidence that may criminate himself: whether or not it will have that tendency is a question for the decision of the Court; and while guarding the witness in this privilege which the law allows him on the principle of self defence, they must be careful that he does not assert his right to the detriment of justice: they must be satisfied that the probable answer to the question proposed would subject him to a prosecution; and he cannot be permitted to withhold his evidence on the ground that his private interests are likely to suffer by the testimony he is called upon to give. A witness cannot be compelled to make disclosures which would be prejudicial to public interests.

An infant of any age may be a witness, provided such infant appear to understand the nature and moral obligation of an oath: an objection to the evidence of an infant must be on the ground of a want of understanding, not of age.

It has been before remarked that parol evidence cannot be received of anything which is not within the personal knowledge of the witness: there are,

however, some few exceptions to this rule which it would be well for members of naval courts-martial to bear in mind. We shall endeavour in the first instance to show what is meant by hearsay evidence, and, secondly, in what cases it would be right to admit its production.

Hearsay evidence is when the witness relates circumstances not within his immediate knowledge, but from information he has gained from another party: the production of papers which the witness recognizes to be in the handwriting of a particular person is called hearsay evidence, for the term may be applied both to that which is written and that which is spoken.*

If a person were charged with endeavouring to make a mutinous assembly, and letters were found in his possession, or in his handwriting, containing matter relative thereto, such letters would be received as good evidence to prove the guilt of the accused.

The statements of a dying person, provided he knew himself to be dying at the time he made them, are good evidence; but this rule can only apply where the death of the party is the subject of the charge: it could not be received to substantiate the proof of any other crime but murder.†

"The preliminary inquiry before dying declarations can be received in evidence is, whether the deceased 'apprehended that he was in such a state of mortality as would inevitably oblige him soon to

* 1 Phillips, 185. † 1 Archbold, 114.

answer before his Maker for the truth or falsehood of his assertions. In arriving at a conclusion upon this inquiry, as to the admissibility of the proposed evidence, it is not necessary that the deceased should have explained by any expressions, whether he thought himself likely to live or die. In Woodcock's case it was deemed sufficient to give credit to the declarations, that the deceased had been mortally wounded, and was in a condition which rendered almost immediate death inevitable; and that she was thought by every person about her to be dying. It was considered a proper inference from such circumstances, that she must have felt the hand of death, and must have considered herself as a dying woman. The same doctrine was held in John's case, the court being of opinion, that if it might reasonably be inferred from the wound, or state of illness of a dying person, that he was sensible of his danger, his declaration would be good evidence. And in *Rex* v. *Bonner*, Patteson, J., said that it is not necessary to prove expressions of apprehension of immediate danger." *

The dying declarations of a person who expressed an opinion that he would recover, could not be held as good evidence.

Evidence of what the prisoner said within the hearing of the witness is admissible, as direct or original evidence, and must not be confounded with hearsay evidence. If a body of men conspire to

* 1 Phillips, 284.

carry out an unlawful act, and one of them commit an offence either in action, or by speaking, or writing, in furtherance of the ends for which the conspiracy was formed, the whole are in the eyes of the law equally guilty.* Evidence of seditious speeches made in the meetings of the conspirators would be received not only against the speakers, but against all who were connected with the conspiracy.

* 1 Phillips, 199.

CHAP. VIII.

EXAMINATION OF WITNESSES.

Examination of Witnesses. — Prosecutor not to address the Court on the Matter in issue. — Rules to be observed in the Examination of Witnesses. — Witness not to read his Evidence. — May refresh his Memory by referring to Notes or to the Ship's Log-Book. — Rules for the Cross-examination of Witnesses. — Object of cross-examining a Witness. — Party not to be permitted to discredit his own Witness by general *Evidence. — Credit of a Witness may be impeached by the opposite Party. — Evidence of Seamen should not be rejected on slight Grounds. — Opinion of the Law Officers as to the proper Mode of Proceeding when the Evidence does not affect one or more of several Persons included in the same Charge. — Affidavits from Witnesses who refuse to attend personally not to be received in Evidence. — Letters and Certificates produced by the Prisoner in his Defence.*

At naval courts-martial it is optional with the Court to allow the prosecutor to make a statement with reference to the matter in issue. Except in particular cases, it is generally refused, and after the preliminary forms of the Court have been complied with, it is usual to proceed at once to examine the witnesses in support of the charges on which the prisoner is to be tried.

The degree of faith to be attached to the testi-

mony of a witness, will of course depend upon the means he has had of obtaining a correct knowledge of the circumstances which he is called upon to substantiate; his veracity, general character, disinterestedness in the issue, and freedom from prejudice against the accused; these will be judged of by the members of the Court, and every man will place such reliance on the evidence as in his own conscience he believes it to deserve.

There are two rules which the members of naval courts-martial should be particular in enforcing in the direct examination of witnesses:—

1st. Never to allow questions to be put to a witness, the answer to which cannot bear directly on the matter in issue.

2nd. Nor questions which by their purport evidently suggest the answer which the prosecutor desires to elicit. To the latter rule there are a few exceptions:—To identify a person whom the witness has already described, the person may be pointed out to him, and he may be asked in direct terms if he be the person meant to contradict a fact stated by a previous witness. In some cases where the witness appears to be prejudiced against the party who called him, the Court will allow leading questions to be put. Immaterial questions, which are introductory to others that are material, may, at the discretion of the Court, be asked in direct terms.* A witness may not be allowed to read his evidence, but he may refer to notes, to

* Archbold, 163.

refresh his memory; but the notes must have been made by himself, or in his presence, and he must swear to their being correct. * So, also, a ship's log, or other public books and papers, may be shown to a witness, to recall to his knowledge facts which require to be proved; but he must swear to the correctness of the particulars which may thereby be brought to his recollection. Copies of documents may not be shown to a witness for the above purpose, unless the same were made in his presence, and he, of his own knowledge, knows them to be correct. The opposite party has a right to inspect any notes or documents used by the witness, and he may cross-examine him upon them. † If a question proposed be objected to, the opinion of the Court must be taken, and the question admitted or rejected as the majority shall decide. ‡

When the direct examination is concluded, the witness may be cross-examined by the Court and the opposite party. In the cross-examination, leading questions may be put to the witness; that is to say, questions may be framed so as to lead directly to the testimony required, but not so as to suggest the very expressions which the party examining wishes to elicit. Except in particular cases, it is not usual to cross-examine witnesses who give evidence only as to character; neither is it customary to cross-examine a witness who is called merely to support some immaterial fact.

* Archbold, 164. † Ibid. 166.

‡ Queen's Regulations, chap. vii. art. 8., p. 79.

The Court should insist on the cross-examination being confined to such points as may bear on the matter in issue.

A witness, after being sworn, may be cross-examined, notwithstanding that the party by whom he was called should decline to put any questions to him.

If the party calling a witness refuse to examine him, after being sworn, and the opposite party cross-examine him, the former cannot be allowed to put any question to the witness which does not arise directly from the matter elicited by the cross-examination.

The object of cross-examining a witness, is to render his evidence more complete, — to lead him to certain points within his knowledge, which he may not have clearly explained, — or to show by collateral circumstances that his evidence does not convey the truth and the whole truth. It is scarcely to be expected in a lengthy examination, that the statements made by a witness should agree in every minor particular; in fact, if such were the case, it might rather weaken the evidence, for it would lead us to infer, that it had been studied with a view to favour one or the other party. It is impossible, however, to lay down any rules for the guidance of jurors on this all-important subject; the degree of intelligence which the witness appeared to possess, his demeanour before the Court, his tone of voice, and his apparent freedom from prejudice for or against either of the parties con-

cerned in the trial, would go far in directing the Court as to the faith which his testimony deserved.

"A party will not be permitted to discredit his own witness by *general evidence.* 'This,' says Mr. Justice Buller, 'would enable him to destroy the witness if he spoke against him, and to make him a good witness if he spoke for him, with the means in his hand of destroying his credit if he spoke against him.' The meaning of this rule is, that a party, after producing a witness, cannot prove him to be of such a general bad character as would render him unworthy of credit.

"But if a witness state facts against the interest of the party that called him, another witness may be called by the same party to disprove those facts; for such facts are evidence in the cause, and the other witness is not called directly to discredit the first, but the impeachment of his credit is incidental only, and consequential. The object of such evidence is to correct some supposed misstatement, or to rectify an error; and if such evidence were to be excluded, the consequences would be most injurious to the administration of justice, as well in criminal as in civil cases." *

But the credit of a witness may be impeached by the opposite party, either on the cross-examination, or on evidence adduced specially for that purpose. The question whether from the knowledge a witness has of a certain person, he considers him to be worthy of belief on his oath in a court of justice,

* 2 Phillips, 448.

would be a proper question. But it would not be right to examine a person as to particular facts, except to show that the witness whose credit is impeached has formerly made a different statement respecting the matter under investigation to that which he has made to the Court.

"If a witness on being questioned whether he has not been guilty of a felony or of some infamous offence, deny the charge, the party against whom the witness has been called will not be allowed to prove the truth of the charge: such evidence is not admissible, either for the purpose of contradicting or of discrediting him. This principle has been established by many cases of great authority. In the case of Rookwood, who was tried for high treason, the point was considered as too clear for argument: — 'Look ye,' said Lord Chief Justice Holt, 'you may bring witnesses to give an account of the general tenor of the witness's conversation; but you do not think that we will try at this time whether he be guilty of robbery.' And on the trial of Layer for high treason, Lord North and Grey being called on behalf of the prisoner to give a report of the character which one of the witnesses for the prosecution had given of himself much to his disadvantage; the Lord Chief Justice Pratt said to the prisoner's counsel, — 'You know what the rule of practice and evidence is, when objections are made to the credit and reputation of the witness: you cannot charge him with particular offences, for if that were to be allowed, it would

be impossible for a man to defend himself. You are not to examine to particular facts, to charge the reputation of any witness, but you are to ask in general, what is his character and reputation.' And in summing up the case to the jury the Chief Justice said, 'The reason why particular facts are not to be given in evidence to impeach the character of the witness, is that, if it were permitted, it would be impossible for that witness, having no notice of what will be sworn against him, to come prepared to give an answer to it; and thus the character of witnesses might be vilified, without having an opportunity of being vindicated.'" *

It will frequently be found that seamen are averse to giving evidence which may operate to the prejudice of their officers: it is oftentimes a work requiring much patience and ingenuity to extract from them facts to substantiate charges against their superiors. But however blamable in a moral point of view such conduct may be, it would scarcely warrant us in altogether rejecting the evidence of such witnesses: the character of the men must be considered, their position in life, which leads them constantly to look up to their officers for counsel and direction: their desire to shield the officers may be viewed as the consequences of a generous but uncultivated mind, rather than as a proof of indifference to the obligations and sanctity of the oath by which they are bound.

Upon the indictment of several persons on the

* 2 Phillips, 431.

same charge, if there should be no evidence to implicate one of the party, the Court should, on the application of any of the other prisoners to that effect, proceed to the acquittal of the one against whom nothing is proved, in order that he may be enabled to give evidence for such of the prisoners as may think fit to call him.

On the 18th of September, 1792, William Muspratt, Haywood, Morrison, Milward, Barkitt, Ellison, Coleman, Norman, Mackintosh, and Byrne, were tried by court-martial, for mutiny on board His Majesty's ship "Bounty;" the six former were sentenced to suffer death, the four latter were acquitted.

William Muspratt, being called on for his defence, delivered a written paper to the Court, which was read by the Judge Advocate as follows:—

"It is every day's practice in the criminal courts of justice in the land, when a number of prisoners are tried for the same facts, and the evidence does not materially affect some, for the Court to acquit those that are not affected, that the other prisoners may have an opportunity to call them, if advised so to do. I beg to have the opportunity of calling Byrne and Norman."

The Court withdrew, and came to the following resolution: "The Court is of opinion that they cannot depart from the usual practice of courts-martial, and give sentence on any particular prisoner until the whole of the defences of the prisoners are gone through."

The several opinions of his Majesty's Attorney and Solicitor-General, and counsel for the affairs of the Admiralty was requested, — "Whether there is any objection to the carrying the sentence of the said court-martial into execution so far as respects William Muspratt?".

Opinion of Sir John Scott.

"I am humbly of opinion, that the circumstances of this case do afford an objection to the carrying the sentence of the court-martial into execution, as far as it respects Muspratt, at least till the opinion of his Majesty's Judges shall have been obtained upon the question whether his application to have the sentence of the court-martial pronounced upon the prisoners whose testimony was represented to be material to the establishment of his innocence, in order that they might be rendered capable, if acquitted, of giving their testimony in his behalf, ought not to have been granted. It is certainly usual in criminal cases, in order to give a prisoner the benefit of such testimony, the credit of which, when given, the Court judges of, to direct previous acquittals of other innocent prisoners, indicted at the same time, in order to enable them to give that testimony. And I apprehend this would obtain in capital cases. I do not observe that the terms in which the court-martial has expressed its judgment upon the application made in behalf of this prisoner clearly imports that this is not the practice of courts-martial; though I must

understand the Court to mean to assert that it is the practice of courts-martial not to give sentence on any particular prisoner till the whole of the evidence (as well as the defences) on behalf of all the prisoners is gone through. Whether that practice is collected from the mere fact that such applications on behalf of prisoners have been so unusual that no instances are remembered of them, or from the habit and usage of rejecting such applications, such having been made and rejected, it may be very material to inquire before it can be determined that there has been such a practice in courts-martial to exclude this evidence as would form the laws of such courts that it should be rejected. And I think the prisoner might reasonably be thought entitled to have the opinion of his Majesty's Judges upon the effect in law of the practice, if proved, to reject such applications whenever they have in fact been made. If such a practice has obtained so generally as to make it a rule of proceeding and of law in ship courts to reject such applications, it is a consideration deserving of great attention, but not falling within the meaning of the questions proposed to me,—How far, if a case exists in which a prisoner has made admissions, which he has made by advice given under a mistaken notion of the rule of proceeding, and has suffered by those admissions, and by the rule of proceeding has been deprived of the evidence which would have a general tendency to establish his innocence, and to give those admissions the same

tendency, the harshness of the rule should, or should not, be corrected by the application of mercy to such a case.

"I have humbly presumed to refer to the opinion of his Majesty's Judges, because it appears to me, that in a case affecting the life of the subject, it is usual to give the subject the protection he can find only in their wisdom, and because in such a case it must be most satisfactory to the public, and to those who are to direct or suspend the execution of a sentence, to look to that wisdom for a solution of any doubts which can be stated respecting the legality of directing the execution of it."

Opinion of Mr. Brodrick.

"It has certainly been a common practice in courts of law, where several persons are accused of the same offence in one indictment, to direct an immediate acquittal of those against whom no evidence at all shall have been given, because the other prisoners are not to be prejudiced by a wrong indictment having been preferred. For the same reason, I should humbly submit that persons accused before a court-martial, if the articles are totally unsupported by any proofs, ought to be discharged, if, by their discharge, the other prisoners will be enabled to establish their innocence. The case of William Muspratt appears to me to deserve great consideration on that account; for if the prisoners Norman and Byrne appeared to be entirely innocent of the offence imputed to them, it must

appear a great hardship to deprive Muspratt of their evidence. I conceive that the practice which has been referred to obtains only in cases where the charge against the prisoners who are acquitted is unsupported by any evidence whatever; for it is not in the power of one prisoner to take the opinion of the Court upon the charges respecting other prisoners upon a doubtful case; and the propriety of denying the application will not depend upon an eventual acquittal. But in the present case, if the prisoners Norman and Byrne appeared clearly innocent to the Court, when the application was made, I am humbly of opinion, that the Court might have pronounced the sentence of acquittal immediately; and inasmuch as Muspratt has lost the advantage which he would, in that case, have reaped from their testimony, it might be proper for the Lords Commissioners of the Admiralty to interfere on his behalf in obtaining the royal mercy."

Opinion of Sir A. Macdonald.

"It happens not unfrequently in the courts of common law, that the judge, when no evidence upon which a conviction can legally follow is given against one or more of the prisoners charged in the same indictment with being concerned in the same offence, recommends it to the jury, if they see the evidence in the same light, to acquit such prisoners, before the others enter on their defence; and this may happen from the suggestion of any of the

prisoners; but in all cases I humbly apprehend, that it depends upon the sound discretion of the judge, whether he will take the sense of the jury upon particular prisoners, according as he shall think that there is or is not any evidence given against them, which ought to be left to the jury; or according as he shall be satisfied from the nature of the case that nothing can arise in the course of the defence of the other prisoners, which may affect those upon whom it is proposed to decide in the first instance; when, for example, the prosecutor has been manifestly misled by appearances, or where it is obvious that some were involved in the indictment, for the purpose of disabling them from being witnesses, and the like. But if there is any evidence on which the jury can deliberate, and which may receive confirmation by going through the whole case, I apprehend the judge would proceed to go through with the whole. In the present case, the fact of Byrne and Norman having continued on board of the "Bounty," was *primâ facie* evidence of their guilt; how far this *primâ facie* evidence of their guilt was done away before the petitioner was called upon to make his defence, can only be known to the court-martial. The inconvenience, at least, of such a right existing as that on which the petitioner seems to rely, may appear from supposing that his application had been complied with, and Byrne and Norman had been acquitted: yet from the examination and cross-examination of witnesses in the course of the

prisoner's defences, their guilt had been established. This is a possible case, and may serve to show the difficulty of conceiving the practice of the courts of common law to rest on any other foundation than the discretion of the judges, guided by all the circumstances of the case, as it shall seem to him that the justice of the case will or will not be best attained by deciding upon all collectively, or upon some separately. The usage and practice of the navy, as stated by the court-martial, will be material to be ascertained if their Lordships resort to the Judges (as I humbly conceive they will), as that may supersede any consideration of what passes in their own courts."*

It is sometimes attempted to lay before the Court affidavits from witnesses who refuse to attend personally; these should invariably be rejected, on account of the obvious injustice to the opposite party, who would be deprived of his right of cross-examination; besides, the affidavit might embrace only a part of the transaction within the knowledge of the deponent and not contain, as his oral evidence would require to do, "*the whole truth;*" and even supposing the deposition to purport to be "the truth, and the whole truth," still, for the reason first mentioned, and from its not being the best evidence that can be adduced (for of course the personal examination of the witness before the Court

* The case of William Muspratt was referred to the Judges, and in consequence of their opinion he was pardoned.

would be better), it should not be received. This rule must not be supposed to apply to letters and certificates as to character used by the prisoner: they cannot, in fact, in their nature be considered as evidence, notwithstanding they are received by the Court, and entered on the minutes; and although they may not bear directly on the matter in issue, the Court, having no reasonable doubt of their authenticity, might view them sometimes as a ground for mitigation of punishment, and sometimes as a proof of such continued rectitude of conduct as to render it highly improbable that the prisoner could have committed the offence wherewith he stands charged. Evidence as to character in order to guide us in arriving at a conclusion as to the guilt or innocence of the prisoner, should, of course, bear on the subject-matter of the charge; for instance, if a man accused of cowardice produced testimonials from various officers under whom he had served, certifying to his gallant conduct on several occasions, we should reasonably doubt the truth of the accusation, for it is difficult to suppose that a man habitually brave for years would suddenly forfeit his honour by a betrayal of fear; but if he merely adduced proof of general rectitude of conduct, it would be no answer to the charge, and could serve only as a ground for praying the leniency of the Court.

CHAP. IX.

PRISONER'S DEFENCE.

Mode of Proceeding when all the Evidence on the Part of the Prosecution has been heard. — Prisoner may avail himself of the Assistance of Counsel. — Mode of Proceeding when the Defence has been read. — Prosecutor not to call Witnesses after the Prosecution is closed. — Court may call Witnesses, but not as to any new Fact. — Prisoner may address the Court after examining Witnesses in his Defence. — Witnesses not to be examined within hearing of each other. — Captain of the Ship to which the Prisoner belongs generally conducts the Prosecution.

As soon as all the evidence on the part of the prosecution has been heard, the prisoner should be called upon for his defence: the Court will generally grant the indulgence of an adjournment for a reasonable time, to enable him to prepare the same. On reassembling, the witnesses and audience should be admitted, and the defence, if a written one, read by the prisoner, or, if he request it, by the Judge Advocate. It may here be remarked, that although a prosecutor or a prisoner at a naval court-martial may avail themselves of the assistance of counsel, it is not customary to permit them to address the Court, or in their own person, to examine, or cross-examine, witnesses: their duties ought to be confined to suggesting to their clients such course as

they may deem to be most advisable. No person should be suffered to become the adviser of a witness under examination upon any pretence whatsoever.

The reading of the defence, together with such testimonials as to conduct, &c., as the prisoner may lay before the Court, being finished, the witnesses, except the one whom it is intended to examine first on the part of the defence, should be ordered to withdraw out of court. The examination in chief and the cross-examination should then proceed as in the case of the prosecution. If in the cross-examination any new matter should be brought before the Court, the witness may be re-examined by the party who first called him in order to explain such new matter.

The prosecution having closed, it would not be right to permit the prosecutor to call witnesses to disprove any part of the evidence adduced by the prisoner: this he must endeavour to do by cross-examination: if such a course were allowed, the trial would be prolonged to an inconvenient period; but the members of naval courts-martial are, by the Queen's regulations, authorised, at any period of the inquiry, to call, recall, and examine such witnesses as they may deem necessary for the furtherance of justice. But no such witnesses are to be examined as to any new fact. Therefore, if they have reason to believe that the testimony of a witness does not convey the truth, and the whole truth, of the circumstances to which he deposes, it is competent in

them to receive the evidence of other parties, even although it should bear directly against the prisoner.

At the conclusion of the examination of the witnesses for the defence, the Court, on the application of the prisoner to that effect, will, if they think it expedient, permit him to comment upon the evidence which he has brought before them, or urge any matter in his justification which he may have omitted in his first address. But it is not usual to allow the prosecutor the privilege he would have in the courts of common law of making a reply. Here we observe that the members of courts-martial, however deficient they may, at times, have shown themselves to be in knowledge of the technicalities of the law, have, from general usage, so governed their mode of proceeding as to throw the balance of argument, if the case admit of it, directly in favour of the prisoner.

The witnesses should not be examined within hearing of each other; neither should they be allowed to communicate together during the trial: the president of the Court will give directions to this effect. The first rule is easily enforced; the latter, in the confined space of a ship, is more difficult: perhaps, then, it would be better to say, that they should not converse on any matter pertaining to the pending trial. If a witness should disobey these orders, it would scarcely be right to deprive the party who called him of his evidence. This, however, is a point for the decision of the Court. It may, at all events, be inferred that the value of

his testimony would be materially lessened by the appearance of collusion which a disregard of the above injunctions would carry with it.

The task of prosecuting generally, but not necessarily, devolves upon the captain of the ship to which the accused belongs: in some cases, the prosecutor is called upon to give evidence; but this, as before remarked, would be no bar to his continuing in the Court afterwards. It would be very dangerous to hold that a prisoner should so far have the power of modelling his own court-martial as to be enabled by summoning, *ad libitum*, his witnesses, to exclude either the prosecutor or any particular members from the Court. It is in general more likely to mislead than to furnish any useful direction to give an opinion upon speculative questions. We therefore think it impossible to say more than that the prisoner, by summoning the prosecutor as his witness, does not obtain the legal right to exclude him from being present in the Court to conduct the prosecution. But who shall or who shall not be admitted to be present during a trial must be subject to the control of the Court, who are, upon all occasions, the proper persons to decide such questions, upon the respective circumstances belonging to them.

CHAP. X.

ATTENDANCE OF WITNESSES.

Attendance of Civilians to give Evidence cannot be enforced. —Penalty for refusing to give Evidence, or prevaricating, or behaving with Contempt to the Court, only applicable to Persons in the Fleet. — In Cases where the Contempt extends to an Interruption of the Proceedings. — Penalty attached to wilful and corrupt Perjury. — Civilians required as Witnesses to have their Expenses paid. — Prisoners of War and Persons confined in any Gaol required as Witnesses.

THERE is no clause in the Acts of Parliament relating to the government of the navy similar to that in the Army Mutiny Act, compelling the attendance of civilians, duly summoned, to give evidence at courts-martial. Civilians are, of course, frequently examined at naval courts-martial; but it must be remembered that there is no law by which the Court could enforce their presence; neither would they be subject to punishment for contempt of Court, for, by the Act 22 Geo. 2. cap. 33. sect. 17., the penalties for refusing to give evidence, or prevaricating, or behaving with contempt to the Court, are applicable only to "*persons in the fleet*," that is to say, to those who are, at the time, amenable to naval discipline. But if the contempt should extend so far as to interrupt the proceedings, the party offending, in whatever station of life he might

be, would be liable to commitment during the sitting of the Court, for all courts of record have an inherent right to repress contempts in the nature of immediate interruptions. To invest any jurisdiction with a power of either fining or imprisoning, makes it a court of record instantly. A naval court-martial, then, since it has the power to imprison, must consequently be deemed a court of record. Now, the doubt is, whether the 17th section of the act referred to, respecting contempts of Court, which section is applicable only to "persons in the fleet," does not restrict the general power of committing for contempt to the particular case of those persons. Mr. Twiss, counsel for the Admiralty in 1825, was of opinion that the power of the Court in this respect was general, *if the contempt amounted to an interruption or obstruction of its proceedings.* Such commitment, however, could not extend to a lengthened imprisonment, but must naturally terminate with the dissolution of the Court originating it.

If in evidence given before a court-martial, "*any person or persons*" should commit wilful and corrupt perjury, or procure or suborn any person to commit perjury, they would be liable to all the pains and penalties attached to the crime of perjury, notwithstanding they may not have been subject to naval discipline.

To make a false answer to a question in the course of a legal investigation the subject of an indictment for wilful and corrupt perjury, it is

essential that the question itself should be one which is material to the issue. If any person in the fleet should refuse to give evidence on oath or affirmation, or should prevaricate, the Court is authorised to punish such person by imprisonment for any period not exceeding three months; and if any person in the fleet should behave with contempt to the Court, he would be subject to imprisonment for one month.

If the attendance of civilians to give evidence before a court-martial be required, care should be taken, at the time of serving the notice, to tender a reasonable sum to defray their expenses to and from the place of trial, and for their maintenance during the period of the trial. Lawyers, and members of the medical profession, are entitled to remuneration for loss of time; so, also, are those witnesses who may be in "poor circumstances." Naval and military officers are entitled to a reasonable sum, to cover the expenses they may incur by attending on the Court.

If the evidence of prisoners of war be required, their attendance will be ordered by the Secretary of State.

By the 43rd of Geo. 3. cap. 140., any judge of the Courts of King's Bench, or Common Pleas, or any baron of the Court of Exchequer, is authorised to award a writ of *habeas corpus* for bringing any prisoner, confined in any gaol in England, before a court-martial, either for trial, or for the purpose of being examined on any matter depending before such court-martial.

CHAP. XI.

CRIMES COGNIZABLE BY COURTS-MARTIAL.

Crimes cognizable by Courts-Martial. — Civilians not subject to Naval Discipline unless found to be Spies. — Case of Daniel King, tried for endeavouring to corrupt a Sentinel to betray his Trust. — Offences specified in the Articles of War. — Crimes committed on Shore by Persons in the Fleet. — Crimes committed within the Jurisdiction of the Admiralty. — Suggestion for extending the Jurisdiction of the Act 22 *Geo.* 2. *c.* 33. *— Jurisdiction of the Court of Admiralty. — Acts of Parliament define the Powers of Courts-Martial. — Persons not amenable to Courts-Martial for Crimes committed on board the Queen's Ships after being discharged from the Service. — Officers and Men taking Passage in Ships of War to join other Ships; or borne for Wages and Victuals; or for Disposal; or as lent to do Duty; or employed in Prize-Vessels. — Opinion of the Law Officers of the Crown respecting Officers and Men employed in hired Vessels, &c. — Subjects of a Foreign State voluntarily entering the Service amenable to Naval Discipline. — Prisoners of War should not be permitted to enter the Service. — Pressed Men not subject to Naval Discipline until rated in some Ship. — Officers and others employed on the Lakes in North America. — Case where a second Court-Martial was held on an Offender before the Sentence of the first Court-Martial was carried into execution. — Officers on Half-Pay, or who have quitted the Service, may be tried for Crimes committed by them when serving. — Persons released from Arrest may be tried at a subsequent Period. — Peers of the Realm,*

when in the Service, subject to Courts-Martial. — Privileges of Parliament do not exempt Persons from Trial by Court-Martial for Offences committed by them in a Naval or Military Capacity. — Marines, when employed in Ships, subject to Naval Courts-Martial; or may be sent to Head-Quarters for Trial. — Circumstances under which the Crimes of Murder and Manslaughter may be taken cognizance of at Courts-Martial. — Case of Francis Ansell, of H. M. S. "Trave," tried for a Murder committed by him on board that Ship when in the River St. Lawrence. — Case of Mr. R. Phillips, Midshipman, against whom a Coroner's Inquest returned a Verdict of Wilful Murder. — Case of Captain Whitby, of H. M. S. Leander, who fired into an American Coasting Vessel, and killed one of the Crew.

THE consideration of the crimes cognizable by courts-martial and the extent of the jurisdiction of those courts demand our next attention. The laws for the government of the Royal Navy were framed only to ensure that degree of discipline and order which is necessary for the maintenance of its safety and efficiency. The members of the naval profession are equally amenable to the law of the land as citizens in a private capacity; but citizens in a private capacity can never be subject to naval discipline except for a breach of the 5th article of war, which provides, that "All spies and all persons whatsoever who shall come or be found in the nature of spies to bring or deliver any seducing letters or messages from any enemy or rebel, or endeavour to corrupt any captain, officer, mariner, or other in the fleet to betray his trust, being convicted of any such offence by the sentence of the

court-martial, shall be punished with death, or such other punishment as the nature and degree of the offence shall deserve, and the court-martial shall impose."

"The employment of spies is a kind of clandestine practice or deceit in war. These find means to insinuate themselves among the enemy, in order to discover the state of his affairs, to pry into his designs, and then give intelligence to their employer. Spies are generally condemned to capital punishment, and with great justice, since we have scarcely any other means of guarding against the mischief they may do us." *

The article of war which we have quoted provides not only against spies, but all persons who shall bring or deliver seducing letters from the enemy or rebel, or endeavour to corrupt any captain, officer, or other in the fleet to betray his trust. In November, 1797, His Majesty's ship "Diana" captured "La Mouche," a French privateer, and amongst the people on board was one Daniel King, an Irishman, who had been taken by the privateer a few days before in the "John and Richard," an American ship from the Brazils. The "Diana" had a number of French prisoners on board at the time, and King was observed to be in very frequent conversation with these prisoners and some suspected men in the ship, expressing his great regard for the French, for whom he said he would lose his life, and inquiring at the same time

* Vattel's Law of Nations, 375.

how many Irishmen they could muster in the "Diana." The officers and several of the men suspected that King was tampering with the prisoners to induce them to rise and take possession of the ship: the small arms and cartouch boxes were carried aft near to the captain's cabin, and placed under the charge of a sentinel. On the evening of the 6th of November, King disguised himself and went to the sentry, and requested to have one of the pistols, and on being refused, offered any sum of money for one of them, at the same time saying, should any questions be asked, he would conceal it in the tier. The sentry, instead of complying with his request, secured the prisoner, and reported his conduct to Captain Faulkner, who, on arriving at Portsmouth, acquainted the commander-in-chief with the circumstances in order to have them investigated by court-martial.

On the case being referred to the Admiralty, their Lordships requested their counsel to peruse the Act 22 Geo. 2. cap. 33. and advise whether the prisoner might be tried by court-martial under the 5th of the Articles of War therein contained? Mr. Percival thereupon delivered the following opinion:

"I am of opinion that the prisoner in endeavouring to prevail upon James Livedale to deliver up to him one of the pistols with the charge of which he, as sentinel, was entrusted, and offering him money for that purpose, does come within the 5th article above referred to, which provides for the

the case of *all persons whatsoever* who shall endeavour to corrupt any captain, officer, or other in the fleet, to betray his trust, and therefore is liable to be tried by a court-martial."

The following offences are specified in the Articles of War, and are those of which a court-martial may take cognizance: —

Neglecting to cause Divine service to be performed.

Profane oaths.

Cursings.

Execrations.

Drunkenness.

Uncleanness.

Scandalous actions.

Holding illegal correspondence with an enemy or rebel.

Not acquainting the superior officer with any letter or message from an enemy or rebel.

Spies.

Persons delivering seducing letters, &c., from an enemy or rebel.

Relieving an enemy or rebel.

Not sending to the court of admiralty all papers found on board prize ships.

Taking effects out of any prize before condemnation.

Stripping or ill-using persons taken on board a prize.

Not preparing for fight and encouraging the men in time of action.

Treacherously yielding, or crying for quarter.

Disobedience or neglect of orders in time of action.

Cowardice and neglect of duty in action.

Not pursuing the enemy, and not assisting a friend in view.

Delaying or discouraging the service on any account.

Deserting to the enemy, pirate, or rebel, or running away with any ship of war or stores.

Deserting, or enticing others so to do.

Entertaining a deserter.

Not taking care of and defending convoy.

Taking goods on board other than for the use of the vessel, except gold, &c.

Making or endeavouring to make mutinous assemblies.

Uttering seditious words.

Behaving with contempt to superiors.

Concealing any traitorous or mutinous practice, or design, or words.

Not endeavouring to suppress mutiny and sedition.

Endeavouring to stir up any disturbance on any account.

Striking, &c., a superior officer.

Quarrelling with or disobeying lawful commands of a superior officer.

Quarrelling, or using reproachful speeches or gestures.

Wasting or embezzling stores.

Burning any magazine, &c., not belonging to the enemy, pirate, or rebel.

Neglect in the conducting and steering of ships.

Sleeping on watch.

Negligence in performance of duty.

Forsaking station.

Murder.

Buggery or sodomy.

Robbery.

Making or signing false musters, or abetting others in so doing.

Not apprehending prisoners or criminals.

Permitting prisoners to escape.

Scandalous, oppressive, or fraudulent behaviour of officers.

Other crimes not capital.

Members of courts-martial absenting themselves from the trial. (19 Geo. 3. cap. 17. sec. 2.)

And, by 10 & 11 Vict. cap. 59., manslaughter.

If a person in actual service and full pay, in or belonging to the fleet, commit any of the crimes specified above, upon the shore, in any place or places out of Her Majesty's dominions, he would be liable to be tried and punished for the same in like manner as if they had been committed at sea, on board any of Her Majesty's ships-of-war. So far, then, the Articles of War answer the purpose of maintaining order amongst the naval forces that may be employed in foreign countries; but the legislature, jealous of infringing on the authority of the civil tribunals, has limited the

exercise of naval law to crimes committed *on shore, in Her Majesty's dominions*, to those only of which the former are not supposed to be competent to judge, namely, mutiny, desertion, and disobedience to any lawful command, when in actual service, relative to the fleet. Persons guilty of these offences would fall under the 15th article of war, as relates to those who desert to the enemy, pirate, or rebel; of the 16th, relative to every person, in or belonging to the fleet, who shall desert; of the 19th, relative to those who shall make, or endeavour to make, any mutinous assembly; and of the 22nd, relative to striking a superior officer, or disobeying a lawful command. Crimes of the above nature, committed by persons subject to naval discipline, in any part of Her Majesty's dominions on shore, would come within the jurisdiction of courts-martial, the same as if they had been committed at sea. With these exceptions, all the offences mentioned in the Articles of War would be referable only to the ordinary tribunals of the country; so, also, if they were committed on board a ship in commission, provided the ship was not at the period on the main sea, in great rivers, beneath the bridges of the said rivers, nigh to the sea, or in any haven, river, or creek, within the jurisdiction of the Admiralty.

In these days, when steam-vessels are so much employed, not only in the active operations of war, but in the conveyance of troops, &c., from one part to another, it is not at all improbable that they

may frequently be required to pass above the bridges of the great rivers: whenever such may be the case, according to the present law, their crews would be amenable only to the 5th, 34th, and 35th articles of war. When the act for the better government of the navy (22 Geo. 2.) was passed, the presence of a ship-of-war above the bridges of the Thames, for instance, was not contemplated; but now, when such a circumstance is so likely to occur, we would venture to suggest that the act be extended to apply to all places where a naval force may be employed, and to all the crimes specified, committed by any person or persons in the fleet, other than those mentioned in the 28th, 29th, and 30th articles, which might be judged of in the ordinary courts, without prejudice to the service. The necessity for such an extension of the Act, will appear the more important when we consider the extent of our colonial possessions, and the likelihood that the officers and seamen of the Royal Navy may, at some period or other, be required to land and assist in their defence.

On the main sea, in great rivers, beneath the bridges of the said rivers, nigh to the sea, or in any haven, river, or creek (that is to say, in those places where ships resort), so also in all places within the jurisdiction of the Court of Admiralty, crimes committed against the Articles of War by persons in actual service and full pay, and forming part of the crew in or belonging to any of Her Majesty's ships-of-war, would be legally judged of by courts-martial.

No river, creek, or harbour in this country is within the jurisdiction of the Admiralty, until they flow past the nearest point of land next to the sea. The Court of Admiralty has jurisdiction of all crimes committed in any river, harbour, creek, or haven, situated in a foreign country.

The jurisdiction of the Admiralty in England, is laid down in an Act of Parliament passed in the 15th year of the reign of Rich. 2., wherein it is "declared, ordained, and established, that of all manner of contracts, pleas, and quarrels, and of all other things done, or 'rising within the bodies of counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction; but all such manner of contracts, pleas, and quarrels, and all other things 'rising within the bodies of counties, as well by land as by water, as afore, and also wreck of the sea, shall be tried, determined, discussed, and remedied by the law of the land, and not before nor by the admiral, nor his lieutenants, in anywise. Nevertheless, of the death of a man, and of maihem done in great ships, *being and hovering in the main stream of great rivers, only beneath the bridges of the said rivers*, nigh to the sea, and in none other places out of the same rivers, the admiral shall have cognizance, and also to arrest ships in the great flotes for the great voyages of the king and of the realm; saving always to the king, all manner of forfeitures and profits thereof coming;

and he shall have also jurisdiction upon the said flotes during the said voyages only," &c.

Courts-martial can be possessed of no powers but those conveyed to them in the particular acts which erect them or refer to them; and there is no clause in the Act 22 Geo. 2. cap. 33. (except the 5th article, already noticed), to authorise them to take cognizance of any crimes committed by other persons than those in actual service and full pay in the fleet or ships-of-war of Her Majesty.

A short time since, a subordinate officer was discharged from the service abroad, and sent to England in a ship-of-war, by admiralty order. On the passage home, he struck the senior lieutenant, and behaved himself otherwise in a most insubordinate manner. On arriving at Plymouth, the commander of the ship transmitted charges, and applied for a court-martial to investigate the conduct of his refractory passenger. A court was refused, because the offender was not, at the period when the offence was alleged to have been committed, in actual service and full pay.

Persons invalided on foreign stations, are by recent regulations allowed full pay until they arrive in England; therefore when embarked in Her Majesty's ships, for passage, &c. they must be considered amenable to trial by court-martial.

Officers and men taking passage in ships of war, to join other ships, or borne on the books of any of Her Majesty's ships for wages and victuals, or for

disposal, or as lent to do duty, being in actual service and full pay, are within the jurisdiction of courts-martial.

Officers and seamen employed in prize vessels are of course amenable to naval martial law. Persons so circumstanced may be dealt with to all intents and purposes as if they were corporally present on board the ships to which they belong, they being victualled by the government, and their names retained on the books of their respective ships for pay, &c.

In June, 1799, the Lords Commissioners of the Admiralty directed the following questions to be laid before His Majesty's attorney and solicitor-general and counsel for the affairs of the Admiralty for their opinion thereon: —

1st. Whether a commissioned officer in actual service and full pay, having the command of a hired armed vessel, *the crew being provided and paid by the owner*;—

2nd. Or a commissioned officer commanding a hired armed tender, in actual service and full pay, *part of her crew* (called the press-gang) *paid by His Majesty* in the same manner as the crew of any of His Majesty's ships, the *remainder* of the crew *paid by the owner*;—

3rd. Or a commissioned officer in actual service and full pay having the command of a hired armed ship or vessel, *manned by seamen paid by the public*, in the same manner as the crews of His Majesty's ships, or either of such commissioned officers can

be considered as in actual service and full pay in the fleet or ships of war of His Majesty, and liable to be tried by a court-martial for any of the offences specified in the several articles contained in the Act 22 Geo. 2. cap. 33. ?

Opinion.

"The doubt upon the two first questions arises out of the words in the Act of Parliament, which confine its operation to persons *in actual service and full pay in the fleet or ships-of-war of His Majesty;* and we are of opinion that a ship hired, manned, and paid, as described in these questions, is not part of the fleet, or one of the ships-of-war of His Majesty. And we are inclined to think that the difference of opinion that has prevailed on this subject has arisen from not adverting to the words '*in the fleet or ships-of-war of His Majesty*,' but from considering the being '*in actual service and full pay*,' as the condition upon which alone the provisions of the statute attach. But with regard to the 3rd question, where it is stated that the vessel is manned with seamen paid by the public, in the same manner as the crews of His Majesty's ships, and wherein we understand the same regulations respecting the hanging up the Articles of War, &c. are observed, and where the owner of the vessel has, during the time it is so hired by the public, no control whatever, either by himself, or any person under his pay, we think such a vessel must be considered as one of His Majesty's ships or vessels of

war; and therefore we think that a commissioned officer in actual service and full pay having the command of such a vessel is liable to be tried by a court-martial."

Signed, JOHN SCOTT.
JOHN MITFORD.
S. PERCIVAL.

Lincoln's Inn,
June, 24th, 1799.

The subject of a foreign prince or state, who *voluntarily* enters the service of Her Majesty, is not exempt from the pains and penalties attending a breach of the naval articles of war: he is equally amenable to the laws which relate to his new condition as a natural-born subject, and equally liable to punishment for a breach of them.

"Mercenary soldiers and foreigners voluntarily engaging to serve the state for money, or a stipulated pay. As they owe no service to a sovereign, whose subjects they are not, the advantages he offers them are their sole motive. *By enlisting, they incur the obligation to serve him*, and the prince on his part promises them certain conditions, which are settled in the articles of agreement." *

It is not proper to allow prisoners of war to volunteer to serve in the ship by which they have been captured, because by so doing they are placed in a doubly perilous situation of forfeiting their lives to their own country, if ever they should be

* Vattel's Law of Nations, p. 297.

taken in arms against it, and also of forfeiting their lives to this country, if ever they should desert to resume an allegiance which they could never put off.

Pressed men are not subject to the articles and orders established by the Act 22 Geo. 2. c. 33. until they are actually rated on board some of His Majesty's ships of war.

By the stat. 29 Geo. 2. c. 27., the Act 22 Geo. 2. c. 33. is extended to the officers, seamen, and others who may be serving on board any of His Majesty's ships employed upon the lakes, great waters, or rivers in North America.

It appears from the following case that a second court-martial can be held upon a person for offences committed between the period of the trial and the execution of the sentence passed by the first court-martial.

On the 23d March, 1776, William Hall, master-at-arms of the Emerald, was tried by court-martial, and adjudged to be reduced from his station and to serve before the mast on board such of His Majesty's ships-of-war as the senior officer at Portsmouth might direct. After the sentence was passed, he was charged with scandalous and mutinous conduct, immediately after the court-martial, on his return to the Emerald, before Sir James Douglas, the admiral commanding at Portsmouth, could possibly by an order direct in what ship Hall should serve before the mast. A question arose whether Hall belonged to any ship in particular till Sir James Douglas had given his order for it, or to the service

in general at the time the offence was committed. The opinion of the Solicitor of the Admiralty was desired thereupon, and that officer stated, — "As the behaviour complained of was immediately after the sentence of the Court, and before it could have been duly carried into execution, the complaint is proper for the consideration of another court-martial." Hall was tried accordingly, and described in the charge as "William Hall, late master-at-arms of His Majesty's ship Emerald, who, by sentence of a late court-martial, was ordered to do duty before the mast in one of His Majesty's ships."

In the year 1760, a question was referred to the Judges from His Majesty in council, whether an officer after he had quitted the service was amenable to a court-martial for offences committed when in actual service? and Lord Mansfield communicated a clear opinion of the Judges that he was. Exclusive, however, of this high authority, the obvious construction of the Act of Parliament (22 Geo. 2. c. 33.) is sufficient. The Act gives the jurisdiction generally over certain offences committed by *persons in the fleet*, and the limitation of that jurisdiction is by confining it to such persons as were *in actual service and full pay* when the offence was committed. It is clear, therefore, in order to see whether the offender be or be not within the jurisdiction of the court-martial, we must see what his condition was *at the time when he committed the offence;* and if at the time he was in actual service and full pay, he is within the jurisdiction, though he may be upon

half pay, or retired from the service before his trial, or even before his offence was reported to the Admiralty.

But if the party accused shall have left or been dismissed from the service, it is very doubtful whether the Admiralty would be authorized in causing him to be apprehended in England and sent abroad for trial, though he might be apprehended for the purpose of being tried in this country; and for any capital offence cognizable in the common law courts he might be tried at a session for the jurisdiction of the Admiralty for crimes committed beyond the seas.

If a person were placed in arrest on a charge which his prosecutor did not at the time feel himself in a situation to prosecute with effect, and therefore liberated him, that circumstance would not render a subsequent trial illegal, when either upon fresh evidence, or upon a more revised review of the same, it is thought proper to proceed.*

Peers of the realm, when members of the naval service, cannot assert their privilege as an exemption from their being tried by court-martial for a breach of any of the articles and orders contained in the Acts for the government of the navy. This measure was proposed, and rejected, on the passing of the bill in 1749.

"The privileges of parliament do not protect a person belonging to the navy or army, from being

* Subject, however, to the limitations explained in Chap. II., p. 29.

amenable to a court-martial, for offences committed in his naval or military capacity; but previous to the arrest of any member, for the purpose of trying him by a naval or military court-martial, it is usual to give notice to the house of which he is a member, accompanied by a request that parliament will consent, for the expediency of public justice, to his being put under arrest for trial." *

Marines, when borne on the books of any of Her Majesty's ships in commission, are subject to naval discipline, and may be "proceeded against and punished for offences committed by them whilst so borne, in the same manner as the officers and seamen employed in the Royal Navy may be tried or punished." †

When marine officers or marines are landed from any of her Majesty's ships to be employed in military operations on shore, and the senior naval officer present issues an order declaring them, during the time they may be on shore, to be subject to the regulations of the Marine Mutiny Act, they would not be liable, while such order remained in force, to be tried by naval court-martial. But the fact of marine officers and marines being borne on the books of any of her Majesty's ships in commission does not relieve them from the obligations imposed by the Mutiny Act. So if a marine officer or marine should, when embarked on board of one of her Majesty's ships, commit any offence specified

* M'Arthur, vol. ii. p. 3.

† Marine Mutiny Act, 1849, cap. 12. sect. 6.

in the Mutiny Act, but not cognizable at a naval court-martial, it would be right in such case to send the offender to the head quarter of his corps for trial in like manner as other marine officers and marines are tried when not embarked in her Majesty's ships.*

By the 8th section of the act 9 Geo. 4. cap. 31. it is enacted that "where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England, shall die of such stroke, poisoning, or hurt, in England, or being feloniously stricken, poisoned, or otherwise hurt in any place in England, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England in which such death, stroke, poisoning, or hurt, shall happen, in all respects as if such offence had been wholly committed in that county or place."

In the 28th article of war, it is declared that "all murders committed by any person in the fleet shall be punished with death by the sentence of a court-martial." It is only under certain circumstances, however, that a court-martial could

* Marine Mutiny Act, 1849, cap. 12. sect. 6.

take cognizance of this crime; for instance, when the stroke, poisoning, or hurt, is given by some person or persons in actual service and full pay, on the main sea, in great rivers beneath the bridges, in places where ships resort within the jurisdiction of the Admiralty, or in places out of Her Majesty's dominions; and when the party so stricken, wounded, or hurt, shall die on board one of Her Majesty's ships as aforesaid, or in any place out of Her Majesty's dominions, the case would be legally judged of by court-martial. But if the stroke, poisoning, or hurt, should be given as above described, and the wounded man be removed to an hospital or other place on shore in Her Majesty's dominions and die there; or if the wound which caused death should have been inflicted on the shore in any place within Her Majesty's dominions, or on board any ship, vessel, or boat, lying without the jurisdiction of the Admiralty, the offender must be given up to the civil authorities to be tried by the ordinary tribunals of the country, according to the provisions of the 8th section of the Act 9 Geo. 4. cap. 31. before noticed.

The foregoing remarks are applicable also to the crime of manslaughter, which, by the act 10 & 11 Vict. cap. 59., is made cognizable by court-martial.

On the 27th of October, 1815, a court-martial assembled on board His Majesty's ship St. George, at Plymouth, for the trial of Francis Ansell, ship's corporal of the "Trave," on a charge exhibited against him by Captain John Codd, for the wilful

murder of William Thompson, corporal of marines serving on board the said ship.

It appears that the prisoner was, at the time of the commission of this crime, as well as the deceased, in actual service and full pay in La Trave, which was one of His Majesty's ships in commission at anchor in the river St. Lawrence, near to Quebec, and that immediately after the death of Thompson an inquisition was held on the body by the coroner of the district, when a verdict of wilful murder was returned against the prisoner, who was thereupon committed to take his trial at the following session of oyer and terminer at Quebec. That court, upon mature deliberation, decided that the case was out of its jurisdiction; in consequence of which decision the prisoner was sent back to La Trave by order of the governor of the province, and on arriving in England in that ship he was tried by court-martial at Plymouth and sentenced to suffer death.

The prisoner pleaded three pleas to the jurisdiction of the court at Quebec:—

1st. "That the felony and murder (if any such there were) were committed at a certain extra-parochial place upon the St. Lawrence, in a certain ship hovering in the main stream of the river, in the county and district of Quebec; and that the said extra-parochial place is not within the jurisdiction of this court, but, on the contrary, in a certain part of the St. Lawrence within the ebbing and flowing of the tide, and within the jurisdiction

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of the High Court of Admiralty of England, and not within the body of any province, &c., subject to the jurisdiction of this court, or of any other court than that of the Court of Admiralty."

2nd. "That the said Francis Ansell, at the time of the commission of the alleged murder, and long before, was a mariner and person of the fleet, serving on board His Majesty's ship 'La Trave,' *the said ship hovering on the main stream of the great river St. Lawrence.*"

3rd. "That, by letters-patent issued to the governor of the province, it was declared as follows: —'Provided always, that nothing herein contained shall be construed to the enabling you, or any by your authority, to hold, place or have any jurisdiction of any offence, cause, matter, or thing committed or done upon the high sea, or within any of the havens, rivers, or creeks of either of our said provinces under your government, by any captain, commander, lieutenant, master, officer, seaman, soldier, or other person whatsoever, who shall be in our actual service and pay, or on board any of our ships of war, or other vessels acting by immediate commission or warrant from our Commissioners for executing the Office of Lord High Admiral of our United Kingdom of Great Britain and Ireland for the time being, under the seal of our Admiralty; but that such captain, &c., so offending shall be left to be proceeded against and tried as their offences shall require, either by commissioners under our Great Seal of this kingdom,

as the statute 28 Hen. 8. directs, or by commission from our said Commissioners for executing the Office of our Lord High Admiral of our United Kingdom of Great Britain and Ireland for the time being, according to an act entitled, "An Act for amending, explaining, and reducing into one Act of Parliament the Laws relating to the Government of His Majesty's Ships, Vessels, and Forces by Sea," &c.'"

Chief Justice Kerr, in his remarks on the above pleas, made the following observations:—

"I consider the proviso in the letters-patent as a declaration of His Majesty's sense and understanding of the 4th and 25th sections of the act 22 Geo. 2. cap. 33.: — 'And wherever crimes are committed on board one of His ships of war, the Admiralty jurisdiction shall extend to the spot where she lays, whether that place be fresh or salt water, whether within the local extent of Admiralty jurisdiction or not.' Both this proviso, and the statutes referred to in it, show that it is a part of the national policy to consider persons on board His Majesty's ships as a distinct order of men in the state, and that they are to be governed by their own code of laws, and subject to the jurisdiction of their own marine courts. The prisoner must be discharged from this bar."

On the 24th September, 1777, Mr. R. Phillips, midshipman of the "Hope," tender, employed in the imprest service, fired at a fishing-vessel, and wounded one of the crew, who was removed to the

shore, where he died. An inquest was held on the deceased, and a verdict of wilful murder returned against Mr. Phillips; the coroner thereupon issued a warrant for his apprehension. Sir Thomas Pye, the commander-in-chief at Plymouth, refused to allow this warrant to be served without receiving instructions to that effect from the Lords Commissioners of the Admiralty. Their lordships referred the case to their solicitor, who delivered the following opinion:—

"It would be very difficult to maintain that the land coroner has no jurisdiction in this case; and, as the Court of King's Bench were unanimously of opinion, after solemn argument, in 1738, that an information should be granted against the captain of a man-of-war for interrupting the land coroner in the execution of a lawful authority, though there was no imputation on the captain for acting otherwise than according to the best of his judgment, I cannot advise the detention of Phillips by the admiral. It may be objected, that the delivery of him to the civil power may tend to encroach on the Admiralty jurisdiction; and I therefore think the best method to remove this obligation would be to apply for a writ of *habeas corpus*, in order to admit Phillips to bail, and, in all events, to have the trial before the judge of the Admiralty. If this method is taken, notice should be given to the coroner and to the deputy clerk of the peace: if it is not taken, I think that Phillips ought to be delivered to the civil power."

In May, 1806, Captain Whitby, in His Majesty's ship "Leander," when cruizing off New York, stood towards an American coasting vessel with the intention of boarding her. As soon as the "Leander" was observed in chase, the coaster hauled from her and escaped. In the course of the pursuit Captain Whitby fired at the vessel, and unfortunately wounded one of the crew, who shortly afterwards died in consequence. This event caused the greatest excitement throughout the United States. The President issued a proclamation, commanding all citizens to do their utmost to apprehend Captain Whitby, and deliver him to the civil authorities, to be tried according to law; prohibited all supplies to His Majesty's ships "Leander," "Cambrian," and "Driver;" and furthermore ordered them to depart without delay from the harbours and waters of the United States. On this unfortunate case being reported, the Lords Commissioners of the Admiralty directed a court-martial to assemble and try Captain Whitby for the wilful murder of the man killed in the coasting vessel. Captain Whitby was tried accordingly, and fully acquitted.

CHAP. XII.

OF PRINCIPALS AND ACCESSORIES IN GENERAL.

Of Principals and Accessories in general. — Of Principals and Accessories in the Crimes noticed in the Articles of War. — Accessories in Murder, Unnatural Offences, and Robbery. — Sections of the Act 7 Geo. 4. cap. 64. applicable thereto.

THERE are crimes which admit of accessories, and those which do not. There can be no accessories in treason: it is the highest crime of which a citizen can be guilty, and all who are implicated in it are deemed as principals. Neither can there be accessories *before* the fact in manslaughter, which must be an unpremeditated offence. If a principal and an accessory be indicted for murder, and the principal be found guilty of manslaughter only, the accessory must be acquitted. Crimes below the degree of felony do not admit of accessories. All those who in felony would be accessories before the fact, in offences under the degree of felony, provided such offences admit of participation, are principals, and must be indicted as such.*

* 4 Black. Comm. 35.

The crimes noticed in the Articles of War may be classed under two heads, namely, "Felonies," and "Misdemeanours." Felony is defined to be an offence, a conviction of which at common law, or in virtue of any statute or statutes, occasions a forfeiture of lands or goods.* The offences specified in the 3rd, 4th, 5th, 6th, 10th, 11th, 12th, 13th, 14th, 15th, 17th, 19th, 20th, 22nd, 25th, 28th, 29th, and 30th articles of war are of a felonious nature; — those in the 1st, 2nd, 7th, 8th, 9th, 18th, 21st, 23rd, 24th, 31st, 32nd and 33rd may be considered as misdemeanours; — and those in the 16th, 26th and 27th include both felonies and misdemeanours.

All persons, being in actual service and full pay, in the fleet or ships of war of Her Majesty, counselling, procuring, or commanding others to commit any of the offences mentioned in the 3rd article, relative to holding illegal correspondence with the enemy; — in the 4th, to not acquainting the superior officer with any letter or message from an enemy; — the 5th, to persons being found to be spies; — the 6th, to relieving an enemy, &c.; — the 14th, to delaying or discouraging the service on any pretence; — the 19th, to mutinous assemblies; — the 22nd, to striking a superior officer; — the 25th, to burning any magazine or vessel not belonging to the enemy (when such burning shall be a hindrance to the service);

* 4 Black. Comm. 93.

—the 26th, to wilfully stranding the ship;—the 27th, to persons forsaking their stations; and the 30th, to robbery (where the articles stolen are public stores), would be liable to be tried for a breach of the 22nd article, which provides that "If any person in the fleet shall conceal any traitorous or mutinous practice or design, being convicted thereof by the sentence of a court-martial, he shall suffer death, or such other punishment as a court-martial shall think fit; and if any person in or belonging to the fleet shall conceal any traitorous or mutinous words spoken by any to the prejudice of His Majesty or government, or any words, practice, or design tending to the hindrance of the service, and shall not forthwith reveal the same to the commanding-officer, or being present at any mutiny or sedition shall not use his utmost endeavours to suppress the same, he shall be punished as a court-martial shall think he deserves."

The 16th article provides for the trial and punishment of those who entice others to desert, and of those who receive and entertain deserters; and the 31st article of those who shall command, counsel, or procure any other person to make or sign a false muster, or muster-book, or aid or abet any other person in the making or signing thereof.

It is only to murder, buggery or sodomy, and robbery (where the articles stolen are not public stores) that our attention remains to be directed; and we conceive that the three following sections

of the act 7 Geo. 4. cap. 64. are a sufficient authority to authorise courts-martial to proceed to the trial and punishment of accessories to these crimes.

Sect. 9. "Be it enacted, that if any person shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any statute or statutes made or to be made, the person so counselling, procuring, or commanding shall be deemed guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished; *and the offence of the person so counselling, procuring, or commanding, howsoever indicted, may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon*, in the same manner as if such offence had been committed at the same place as the principal felony, although such offence may have been committed either on the high seas, or at any place on land, whether within His Majesty's dominions or without; and that in case the principal felony shall have been

committed within the body of any county, and the offence of counselling, procuring, or commanding shall have been committed within the body of any other county, the last mentioned offence may be inquired of, tried, determined, and punished in either of such counties; Provided always that no person who shall be once duly tried for any such offence, whether as an accessory before the fact, or as for a substantive felony, shall be liable to be again indicted or tried for the same offence."

Sect. 10. "Be it enacted that if any person shall become an accessory after the fact to any felony at common law, or by virtue of any statute or statutes made or to be made, *the offence of such person may be inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felon*, in the same manner as if the act by reason whereof such person shall have become an accessory had been committed at the same place as the principal felony, although such act may have been committed either on the high seas or at any place on land, whether within His Majesty's dominion or without; and that in case the principal felony shall have been committed within the body of any county," &c.

Sect. 11. "And in order that all accessories may be convicted and punished in cases where the principal felon is not attainted, be it enacted, That if any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory, either before or after the

fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal felon shall die, or be admitted to the benefit of clergy, or pardoned, or otherwise delivered before attainder; and every such accessory shall suffer the same punishment, if he or she be in anywise convicted, as he or she should have suffered if the principal had been attainted."

CHAP. XIII.

PRINCIPALS IN THE FIRST DEGREE.

Principals in the First Degree. — Principals in the Second Degree. — Accessories before the Fact. — Accessories after the Fact. — Offences of Principal and Accessory different in consideration of Law. — An Acquittal as Principal no Bar to an Indictment as Accessory,

THE general definition of a principal in the first degree is one who is the actor or actual perpetrator of the fact. (1 *Hale*, 233. 615.) But it is not necessary that he should be actually present when the offence is consummated; for if one lay poison purposely for another who takes it, and is killed, he who laid the poison, though absent when it was taken, is a principal in the first degree. (*Vaux's case*, 4 Co. 446. Fost., 349.; *R.* v. *Henley*, 4 C. & P. 269. So, it is not necessary that the act should be perpetrated with his own hands; for if an offence be committed through the medium of an innocent agent, the employer, though absent when the act is done, is answerable as a principal in the first degree. (See *R.* v. *Giles*, 1 Mood. C. C. 166.; *Reg.* v. *Michael*, 2 Mood. C. C. 120., 9 C. & P. 356.) But if the agent be aware of the consequences of his act, he is a principal in

the first degree, and the employer, if he be absent when the fact is committed, is an accessory before the fact." *

PRINCIPALS IN THE SECOND DEGREE.

"Principals in the second degree are those who are present, aiding and abetting at the commission of the fact.

"Presence in this sense is either actual or constructive. It is not necessary that the party should be actually present, an ear or eye-witness of the transaction; he is, in construction of law, present aiding and abetting, if, with the intention of giving assistance, he be near enough to afford it, should the occasion arise. But he must be sufficiently near to give assistance, and the mere circumstance of a party going towards a place where a felony is to be committed, in order to assist in carrying off the property, and assisting in carrying it off, will not make him a principal in the second degree, unless, at the time of the felonious taking, he were within such a distance as to be *able* to assist in it. And although an act be committed in pursuance of a previous concerted plan between the parties, those who are not present, or so near as to be able to afford aid and assistance at the time when the offence is committed, are not principals, but accessories before the fact. So, if one of them have been apprehended before the commission of the offence by the other, he can be convicted only as an ac-

* Archbold, 3, 4.

cessory before the fact. (*Reg.* v. *Johnson*, 1 C. & Mar. 218.) But presence during the whole of the transaction is not necessary; for instance, if several combine to forge an instrument, and each executes by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals." *

"There must also be a participation in the act; for although a man be present whilst a felony is committed, if he take no part in it, and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony or apprehend the felon." (1 *Hale*, 439.; *Fost.* 350.) "It is not necessary, however, to prove that the party actually aided in the commission of the offence; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was present aiding and abetting. So, a participation, the result of a concerted design to commit a specific offence, is sufficient to constitute a principal in the second degree." "If one encourage another to commit suicide, and be present abetting him while he does so, such person is guilty of murder as a principal; and if two persons encourage each

* Archbold, 4.

other to self-murder, and one kills himself, but the other fails in the attempt, the latter is a principal in the murder of the other. (*R.* v. *Dyson*, R. & R. 523.) So likewise if several persons combine for an unlawful purpose, or for a purpose to be carried into effect by unlawful means, particularly if it be to be carried into effect, notwithstanding any opposition that may be offered against it, and one of them, in the prosecution of it, kill a man, it is murder in all who are present, whether they actually aid or abet, or not, provided the death were caused by the act of some one of the party in the course of his endeavours to effect the common object of the assembly. But the act must be the result of the confederacy; for, if several are out for the purpose of committing a felony, and, upon alarm and pursuit, run different ways, and one of them kill a pursuer to avoid being taken, the others are not to be considered as principals in that offence." (*R.* v. *White*, R. & R. 99.)*

"A mere participation in the act, without a felonious participation in the design, will not be sufficient." (1 *East, P. C.* 258.; *R.* v. *Plummer*, Kel. 109.) "Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him and kill the other, it is manslaughter in the servant, and murder in the master." †

"In the case of murder by duelling, in strictness both of the seconds are principals in the second degree; yet Lord Hale considers that as far as

* Archbold, 5. † Ibid. 6.

relates to the second of the party killed, the rule of law in this respect has been too far strained; and he seems to doubt whether such second should be deemed a principal in the second degree." (1 *Hale*, 422. 452.) "The seconds in a duel being participators in an unlawful act would both be guilty of murder if death were to ensue, and so the law was laid down in *Reg.* v. *Young*, 8 C. & P. 645, and in *Reg.* v. *Cuddy*, 1 C. & K. 210.' If the principal were insane at the commission of the act, no person can be convicted as an aider or abetter in his act. (*Reg.* v. *Tyler*, 8 C. & P. 616.) But where an insane person collected together a number of persons who armed themselves with a common purpose of resisting the lawful authorities, and in their presence he shot a peace officer who came to apprehend him under a warrant, it was held that they were guilty of murder as principals in the first degree; and that no apprehension of personal danger to themselves from him furnished any excuse to them for assisting in his illegal acts. If indicted as aiders and abetters, an indictment charging that A. gave the mortal blow, and that B., C., and D. were present aiding and abetting will be sustained by evidence that B. gave the blow, and that A., C., and D. were present aiding and abetting; and even if it appear that the act was committed by a person not named in the indictment, the aiders and abetters may nevertheless be convicted. *R.* v. *Borthwick*, Doug. 207.; 1 East, P. C. 350.*

* Archbold, 6, 7.

ACCESSORIES BEFORE THE FACT.

"An accessory before the fact is he who being absent at the time of the felony committed, doth yet procure, counsel, command, or abet another to commit a felony." (1 *Hale*, 615.)

"The procurement may be personal or through the intervention of a third person." (*Fost.* 125.) "The bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact. (2 *Hawk.* c. 29. s. 23.) Nor will a tacit acquiescence, or words which amount to a bare permission, be sufficient to constitute this offence. (1 *Hale*, 616.) The procurement must be continuing, for, if the procurer of a felony repent, and before the felony is committed actually countermand his order, and the principal notwithstanding commit the felony, the original contriver will not be an accessory. (1 *Hale*, 618.) So, if the accessory order or advise one crime, and the principal intentionally commit another; as, for instance, to commit a crime against A., and instead of doing so he commit the same crime against B., the accessory will not be answerable. (1 *Hale*, 617.) But if the principal commit the same offence against B. by mistake, instead of A., it seems it would be otherwise." "The accessory is liable for all that ensues upon the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he dies, A. is accessory to the murder. So, if the offence commanded be effected, although

by different means to those commanded; as, for instance, if J. W. hire J. S. to poison A., and, instead of poisoning him, he shoot him, J. W. is nevertheless liable as an accessory." (*Fost.* 369, 370.) "If a man be indicted as accessory in the same felony to several persons, and be found accessory to one, it is a good verdict, and judgment may be passed upon him." * (1 *Hale*, 624.)

ACCESSORIES AFTER THE FACT.

"An accessory after the fact is one who knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. (1 *Hale*, 618.) Any assistance given to one known to be a felon in order to hinder his apprehension, trial, or punishment, is sufficient to make a man an accessory after the fact." (1 *Hale*, 619.) "But merely suffering the principal to escape will not make the party an accessory after the fact; for it amounts at most but to a mere omission." (1 *Hale*, 619.) "So if a person speak or write in order to obtain a felons pardon or deliverance, or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly (1 *Hale*, 620.); or even if he himself agree for money not to give evidence against the felon; or know of the felony and do not discover it (1 *Hale*, 317. 618.); none of these acts would be sufficient to make the party an accessory after

* Archbold, 9.

the fact. He must be proved to have done some act to assist the felon personally. But if he employ another person to do so, he will be equally guilty as if he harboured or relieved him himself."* "If two persons are indicted as principals, and one is proved to be only accessory, he must be discharged on this indictment, for, in consideration of law, their offences are quite different. And one indicted as accessory before the fact cannot be convicted upon evidence proving him to have been (principal in the second degree) present aiding and abetting at the fact."† "An acquittal on an indictment for having been present aiding and abetting in a felony is no bar to an indictment charging the party as accessory before the fact, because the offences described in the two indictments are distinct in their nature."‡

* Archbold, 9. † 1 Phillips, 502. ‡ 2 Phillips, 26.

CHAP. XIV.

OF PLEAS, ETC.

Pleas to be pleaded immediately the Court is sworn. — Plea to the Jurisdiction — in Abatement; on the Ground of former Acquittal, or former Conviction. — Case of William Maxwell, Boatswain of H. M. S. "Tweed." — Pardon — having been already punished for the Offence.

When a prisoner at a court-martial has any special matter to plead in abatement, or in bar of trial, he should plead it immediately the court is sworn. The pleas of which a prisoner may take advantage in the courts of common law are equally valid at courts-martial.

Plea to the jurisdiction. — When the Court hath no cognizance of the offence, the prisoner may plead to the jurisdiction*; for instance, if a man were charged before a court-martial with robbery, in Her Majesty's dominions on shore, the offence would not be within the jurisdiction of such court: or when the court is not properly constituted according to the provisions of the Act 22 Geo. 2. cap. 33.; or when at the time the offence was alleged to have been committed, the prisoner was not in actual service and full pay in the fleet or ships of war of Her Majesty, &c.

* Archbold, 80.

Plea in abatement. — When the charge assigns to the prisoner a wrong name. This plea would be of little avail, for by the stat. 7 Geo. 4. c. 64. s. 19. it is enacted, that no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong condition, of the party offering such plea; but, in such case, the Court shall forthwith cause the indictment or information to be amended according to the truth, and call upon the party to plead thereto, and proceed as if no such dilatory plea had been pleaded.

If the prisoner be indicted in the name which he bears on the ship's books, and by which he is always called and known in the ship, it is sufficient. To obviate any difficulty on this point, we would recommend, that in one of the muster books (the complete book, for instance), the christian and surname of every officer and man should be written in full, and not abbreviated as is frequently the practice.

On either of the above pleas, if considered to be well founded, it would be the duty of the Court to represent the same to the officer who ordered the court-martial to assemble, so that such corrections might be made in the charges, &c., as would meet the necessities of the case.

Former acquittal.—"When a man is indicted for an offence and acquitted, he cannot afterwards be indicted for the same offence, provided the first indictment were such that he could have been law-

fully convicted on it; and if he be thus indicted a second time he may plead '*autrefois acquit*,' and it will be a good bar to the indictment."* Thus an acquittal on the ground that the offence charged was committed prior to the date mentioned in the indictment (which would be an erroneous acquittal†), may be pleaded as a bar to an indictment for the same offence, charging it on the right day. At common law, if a man be indicted for any offence, which in the indictment is charged to have been committed on a certain day, he may well be convicted upon that indictment, though the evidence should prove it to have been committed on a different day, the day in an indictment not being material, provided the offence be proved to have been committed before the date specified therein; and therefore if, by any misapprehension of the Judge or the jury, he was acquitted by reason of that variance, he might plead his acquittal to any other indictment for the same offence, although such other indictment charged the offence to have been committed on the right day; and the principle of law which will not suffer a man's life to be in danger twice for the same offence would entitle him to his acquittal again. Greater strictness, we imagine, cannot be required in a charge before a court-martial than in an indictment at common law.

There are some exceptions to the above rule, as, for instance, in charges founded on letters written by the prisoner, if such letters do not correspond

* Archbold, 87. † *Vide* Appendix, No. XV.

with the dates specified in the charge, the variance would entitle the prisoner to an acquittal. So, also, where time is of the essence of the offence. And where the time stated must, to substantiate the charges, necessarily be proved, it is imperative that it should be correctly stated.

"An acquittal upon an indictment for murder may be pleaded in bar of another indictment for manslaughter, because the defendant might be convicted of manslaughter on the first indictment." "So an acquittal upon an indictment for manslaughter is, it seems, a bar to an indictment for murder."* But an acquittal upon an indictment before an incompetent court is, in strictness of law, no bar to a subsequent trial before a competent court. An acquittal as accessory is no bar to an indictment as principal; neither can an acquittal as principal be pleaded to a subsequent indictment as accessory.

Former conviction. — Since the passing of the Act 7 & 8 Geo. 4. cap. 28., attainder is no bar, unless for the same offence as that charged in the indictment†, and even then, if the trial had taken place before a court not properly constituted, it would, provided no part of the sentence had been carried into execution, be no bar to a new trial before a competent court. In May, 1828, William Maxwell, boatswain of the "Tweed," was tried by court-martial on board His Majesty's ship Maidstone, in Simon's Bay, Cape of Good Hope, and

* Archbold, 87. † Ibid. 93.

sentenced to suffer death for a breach of the twenty-ninth article of war. Three commanders sat as members on this court-martial; consequently their proceedings were illegal, and the sentence void. The Crown lawyers were requested to state their opinion whether Maxwell could be legally brought to trial before a competent tribunal? — and whether, in the event of one or more of the same officers who composed the former court sitting again as members on the new court-martial, any legal objection on that account can arise to the proceedings?

Opinion.

"We think the party accused not having been tried before a tribunal legally constituted, may be brought to trial before a competent tribunal; and we see no objection to the same officers who constituted the former court sitting again on the trial of the party accused, for this is not the case of re-hearing the charge, but a case in which there has been no trial at all, the Court having been illegally constituted.

"CHARLES WETHERELL.
"N. C. TINDAL."

Maxwell was accordingly tried, and the Court sentenced him to suffer death.

Pardon.—"A pardon may be pleaded in bar to the indictment; or after verdict, in arrest of judgment, or after judgment, in bar of execution."*

* Archbold, 93.

"A pardon may be pleaded in bar, as at once destroying the end and purpose of the indictment, by remitting that punishment which the prosecution is calculated to inflict."*

The thirty-sixth article of war directs that all crimes, *not capital*, and not mentioned in the Act of the 22nd Geo. 2. cap. 33., shall be punished according to the laws and customs in such cases used at sea. If the commanding officer of a ship should punish a man *for any capital offence*, it would be an illegal punishment, and in strictness of law no bar to the trial of the offender by a competent tribunal. But whatever may be the strict law of the case, the fact of a man being twice punished for the same offence is so repugnant to our ideas of justice, that we very much doubt whether, except on the most urgent occasions, any officer would order a man to be tried by a court-martial on charges embracing crimes for which his commander had already inflicted summary punishment upon him.

* 4 Black. Comm. 337.

CHAP. XV.

INSANE DELUSIONS AND DRUNKENNESS.

Law relating to Crimes committed by Persons afflicted with insane Delusions. — Drunkenness no Excuse. — Prisoner becoming mad before Trial; or during Trial; or after Trial, before Execution.

On a discussion in the House of Lords in the case of Reg. *v.* M'Naughten, their lordships directed that the following questions should be submitted to the Judges, in relation to the law respecting alleged crimes committed by persons afflicted with insane delusion:—

"First. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit?

"Second. What are the proper questions to be submitted to the jury, when a person alleged to be inflicted with insane delusion, respecting one or more particular subjects or persons, is charged

with the commission of a crime (murder, for example), and insanity is set up as a defence?

"Third. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed?

"Fourth. If a person, under an insane delusion as to the existing facts commits an offence in consequence thereof, is he thereby excused?

"Fifth. Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law, or whether he was labouring under and what delusion at the time?"

To these questions, the judges replied as follows:—

First Question. "Assuming that your lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of

committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.

Second and third Questions. "That the jury ought to be told in all cases that every man is supposed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions, has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong, which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally, and in the abstract, as when put to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential, in order to lead to a conviction; whereas the law is administered upon the

principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course, we think, is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

Fourth Question. "The answer to this question must of course depend on the nature of the delusion; but making the same assumption as we did before, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

Fifth Question. "We think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated,

because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But when the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right."

Drunkenness is no excuse for the perpetration of any crime; on the contrary, it would rather be looked upon as an aggravation. But in some instances it is adduced, to show that the act with which the prisoner stands charged was unpremeditated. No description of madness, voluntarily contracted, will absolve a man from the punishment due to the crime he may commit whilst under the influence of such madness. But if the madness becomes habitual and confirmed, it would be otherwise. For instance, if a man, while in a state of frenzy from drunkenness, kill another, he must be held responsible for the act; but if he kill him while labouring under confirmed madness, caused by a riotous and debauched mode of living, he will not be amenable to punishment. To ascertain the degree of responsibility that attaches to the criminal acts of a person, the points that require to be investigated are, whether, at the time of the commission of the offence charged, he was in a state of mind to distinguish evil from good, and to know

that what he was doing was contrary to the laws of God and man. If he had sufficient reason to observe these distinctions, and possessed the knowledge referred to, he must be held answerable for the consequences of those acts: these are questions which the court-martial must decide.

"If a man in his sound memory commits a capital offence, and, before arraignment for it, he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if, after judgment, he becomes of nonsane memory, execution shall be stayed; 'for peradventure,' says the humanity of the English law, 'had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution.'"*

* 4 Black. Comm., 24.

CHAP. XVI.

APPOINTMENT AND DUTIES OF THE OFFICIATING JUDGE-ADVOCATE.

Appointment and Duties of Officiating Judge-Advocate. — Opinion of Judge Bathurst thereon. — Duty when conducting a Prosecution. — May give his Opinion on all Matters of legal Doubt. — Not to allow Copies of the Sentence to be taken.

In the absence of the Judge-Advocate and his deputy, the Court is authorised to appoint some person to officiate in that capacity. When the commander-in-chief has no objection, his secretary is generally selected for this duty. It would certainly be better, if the appointment of the officiating Judge-Advocate were vested in the officer who orders the court-martial to assemble, such appointment to be subject to the subsequent approval of the Court. This would remove the anomaly which at present exists in the fact of his being required to perform several duties connected with that office, before he is furnished with a warrant for so doing, besides which, the commander-in-chief, or officer, ordering a court-martial, being deeply interested in the legality of the proceedings, it appears but right, as he cannot be there himself to advise the Court, that he should be allowed to

appoint a person in whose ability and discretion he has confidence. It is not only necessary that the Judge-Advocate should possess an intimate knowledge of the rules and regulations of the naval service, but that he should understand the ordinary forms observed in criminal trials *, the observance of which at courts-martial would, in many cases, have prevented the strictures that have from time to time been passed upon the proceedings of these tribunals.

The duties of a Naval Judge-Advocate are, —

1. To give at least twenty-four hours' notice to the prisoner of a court-martial being ordered to assemble for his trial; at the same time to supply him with a copy of the charges on which he is to be tried, and a list of witnesses intended to be called to support those charges; also to call upon him for the names of the persons whom he intends to examine in his defence.†

2. To give notice to the prosecutor of a court-martial being ordered to assemble.

3. To summon the witnesses required for the prosecution and defence.

4. To advise the Court on the proper forms to

* The author begs leave to call the attention of his brother officers and others to "Archbold's Pleading and Evidence in Criminal Cases," a work without a careful study of which no one should take upon himself the responsible duties of a Judge-Advocate at Courts-Martial held on foreign stations.

† The President, prior to the Court being sworn, should ascertain that the Judge-Advocate has complied with these regulations.

be observed; and to give his opinion on all matters of legal doubt which may arise in the course of the trial.

5. To administer the prescribed oaths to the members of the Court and the witnesses.

6. To take minutes of the proceedings of the Court.

7. To put questions to the witnesses tending to lead the Court to a knowledge of the facts of the matter in issue.

8. To conduct prosecutions instituted on the part of the Crown, or when no prosecutor is present.

9. To collect the votes of the members, and draw up the sentence under the direction of the Court.

10. To prepare a fair copy of the minutes of proceedings, and transmit the same to the Admiralty.

The following questions were submitted to Judge Bathurst, relating to the duties of a Naval Judge-Advocate:—

Question 1. "What is properly the office of a Judge-Advocate? The Act 22 Geo. 2. says, he is to swear the Court and the evidence; and the general printed instructions, under the head of Courts-Martial, direct him to take minutes of the proceedings of the Court, to advise them of the proper forms, and to deliver his opinion on any doubts or difficulties that may arise in the course of the trial. But I should be glad to know whether he is prosecutor for the Crown; and if so, whether

he can with propriety advise the prisoner, and assist him in his defence ?"

Question 2. "By the Act of Parliament of the 22 Geo. 2., a court-martial is authorised, in the absence of the Judge-Advocate of the fleet and his deputy, to appoint a person to execute the office of Judge-Advocate; but as it cannot properly become a court-martial till the members are sworn by a Judge-Advocate, how and when is such a person to be appointed ?

"It appears highly reasonable that he should be appointed some time before the Court assembles, as there ought to be some time to give the prisoner notice of his trial to summon the evidence, &c., which are supposed to be part of the Judge-Advocate's duty. Has not the president, therefore, authority, as soon as he receives an order to assemble a court-martial, to grant a warrant to some person to execute the office ? If not objected to by the majority of the members, he will of course become the officiating Judge-Advocate, agreeably to the Act. And can it be a legal court-martial if the person officiating as Judge-Advocate be appointed by warrant from the commander-in-chief of the squadron instead of the president ?"

Judge Bathurst answered the above questions as follows :—

Answer to Question 1. "The answer to these queries suppose the fact contained in them to be accurately stated, as well as the clauses of the different Acts of Parliament which are alluded to.

"The duty of a Judge-Advocate can only be collected from the statutes which relate to naval courts-martial, and the constant practice since the first of these, which is supposed to be the 13th of Chas. 2. It is undoubtedly his duty that the proofs on the part of the Crown and the prisoner should be properly laid before the Court; and where the point is doubtful, he should incline on the part of the prisoner."

Answer to Question 2. "I think that the court-martial, as soon as it is assembled, may appoint a Judge-Advocate; and as the Act says it must be done by the Court, a majority should concur in the appointment. It might not be improper, however, to have this further explained by a new Act."

When the Judge-Advocate conducts a prosecution on the part of the Crown, or when no prosecutor is present, it is his duty to collect the evidences, and obtain from them a due knowledge of the facts of the case, so as to enable him to bring the same before the Court in a clear and legal shape. Having done this to the best of his ability, it is incumbent upon him, both in a legal and moral point of view, to see that every extenuating circumstance that can be adduced by the prisoner is also properly brought to the notice of the Court.* There can—at least there ought to be—no vindictive feeling mixed up with these prosecutions: they are supposed to be instituted solely with a view of maintaining the honour and interests of

* Queen's Regulations, chap. vii. art. 9., page 79.

the public service: the end sought after is justice, — justice to the Crown and to the accused; the efforts of the Judge-Advocate should therefore be directed to furnishing *every particular* bearing on the matter in issue, so that the Court may be enabled to return a verdict founded on right to all the parties concerned. In his position as prosecutor, he must be considered as assistant to the Court, or in the ancient character of assessor to the Court, though not as separate from, or independent of, the Court, in the now absolute character in which the term prosecutor is sometimes understood. The Court is competent to call and interrogate such witnesses as they may think fit, on any point during the prosecution or defence, although the Judge-Advocate may not choose to examine them. The duty of the Judge-Advocate, in the management of the prosecution, cannot affect the authority of the Court in this respect.

The Judge-Advocate is authorised to give his opinion on all matters of legal doubt which may arise in the course of the trial; but he should be careful not to bias the votes of the members by expressing himself satisfied of the guilt or innocence of the prisoner. He may, if called upon to do so, say that such and such evidence is, *in a legal point of view*, sufficient, or not sufficient, to warrant a conviction; but the issue lies with the Court: to attempt to lead them to any particular verdict would evidently be an injustice to the parties concerned in the trial.

No person should be furnished, on any account whatever, with a copy of the sentence, or any part of the minutes of proceedings: applications to this effect could only be entertained at the Admiralty. But if certificates as to character be placed before the Court, the party producing them may be allowed to have the original documents returned to him on furnishing copies to be attested by the president.

CHAP. XVII.

ON THE SENTENCE AND PUNISHMENT.

Mode of Proceeding when all the Evidence has been heard. — Cases in which the Court have no discretionary Power as to Punishment. — Commissioned Officers cannot be reduced to a lower Rank. — Case of Lieutenant Franklin, R. M. — When the Charges are proved, Prisoner cannot be acquitted. — Officers dismissed cannot receive Half-Pay by Direction of the Court. — Sentence to express of what the Party accused has been found guilty. — Court to be confined to the Investigation of the Subject Matter of the Charge, and to that only. — Court-Martial has no Power to dispose of the Bodies of Criminals after Execution. — The Punishments awarded must be in conformity with the Usage of the Service. — Court-Martial cannot legally sentence a Prisoner to be imprisoned "and kept to hard Labour," *or* "to be kept in solitary Confinement," *or to be* "transported." — *Persons sentenced to Imprisonment to be confined in the Gaol of the County where the Court-Martial is held. — Court to state the Grounds whereon they recommend a Prisoner to Mercy. — In Sentence of Death, the Article of War on which the Judgment is founded to be stated. — Minority may vote on the Question of Punishment. — When the Charges are declared to be frivolous and ill-founded.*

THE proceedings of the Court when all the evidence, &c. for and against the prisoner has been heard, are thus clearly laid down in the Queen's Regulations (chap. viii. pp. 80 and 81.):—

"When the evidence is closed, the accused person

shall be removed, and by-standers shall withdraw; the Court shall then consider the matter in evidence before it, and the Judge-Advocate, or person acting as such, by the direction of the Court, shall draw up such questions as shall be agreed upon, whereon to form a determination in regard to the innocence or guilt of the person upon trial. If the party be found guilty of a breach of any of the articles of war established by law, the Court shall consider and determine on the punishment proper to be inflicted in conformity therewith. The Judge-Advocate, or person acting as such, shall draw up the sentence accordingly, being careful to specify therein the charge, or substance of it; and the same shall be signed by every member of the Court, by way of attestation, notwithstanding any difference of opinion there may have been among the members.

"In taking the opinion of the Court upon all questions, the junior officer shall vote first, and then the other officers in order up to the president; and should the members of the Court disagree upon any question, or on a division the votes should be equal, the point in question shall receive the construction most favourable to the prisoner.*

"After the sentence shall have been drawn up and signed, all persons shall be re-admitted; and

* Whenever it may be necessary to obtain the opinion of the Court on any question, the prosecutor, prisoner, and audience should be directed to withdraw until the Court shall have come to a decision.

the party accused being also present, the Judge-Advocate, or person acting as such, shall, by direction of the Court, pronounce the same."

To some of the offences mentioned in the articles of war, there are specific punishments annexed, which the court-martial have no authority to mitigate. Since the passing of the Act 10 & 11 Vict. cap. 59., the cases in which they are *required* to pass sentence of death are limited to murder, and buggery or sodomy. When the offence has not been made capital by the common law, or by act of parliament, the court-martial could not legally adjudge a person to suffer death for such offence. Persons declared to be guilty of a breach of those articles to which a specific punishment is annexed in the Act 22 Geo. 2. cap. 33. must be sentenced in exact conformity with the provisions of that Act; the slightest variation would be fatal, and render the sentence void.

In the undermentioned cases the Court have no discretionary power either to mitigate or extend that part of the punishment which is printed in italics: —

ART. 7. Not sending to the Court of Admiralty all papers found on board prize-ships.	"*To forfeit and lose his share of the capture,*" and suffer such further punishment, &c.
ART. 8. Taking money, or other effects, out of any prize, before the same shall be adjudged lawful prize in some Admiralty Court.	"*To forfeit and lose his share of the capture,*" and suffer such further punishment, &c.

ART. 16. Commanding officers receiving or entertaining deserters from H. M. ships, and not giving notice to the proper authorities.	"*To be cashiered.*"
ART. 18. Taking any goods on board, other than for the use of the vessel, except gold, silver, jewels, &c.	"*To be cashiered, and be for ever afterwards rendered incapable to serve in any place or office in the naval service of Her Majesty, her heirs, and successors.*"
ART. 28. Murder	"*Death.*"
ART. 29. Buggery or Sodomy.	"*Death.*"
ART. 31. Making or signing false musters or muster-books, or aiding or abetting any other persons in the making or signing thereof.	"*To be cashiered, and rendered incapable of further employment in Her Majesty's naval service.*"
ART. 33. Scandalous, oppressive, or fraudulent behaviour of officers.	"*To be dismissed from Her Majesty's service.*"
ACT 19 Geo. 3., cap. 17., sec. 2. Members of courts-martial absenting themselves from the said courts during the whole course of the trial, except in case of sickness, &c.	"*To be cashiered from Her Majesty's service.*"

On the 6th of June, 1806, Captain John A. Norway, of His Majesty's ship "Tromp," was tried by court-martial at Plymouth, on charges exhibited against him by the carpenter of that ship, for converting the king's stores to his private purposes,

and for making false musters; the Court declared the former charge not proved, and the latter proved, and thereupon adjudged Captain Norway to be "*dismissed from His Majesty's service.*"

The 31st article of war enacts, that every officer or other person in the fleet who shall knowingly make or sign a false muster, or muster-book, or who shall command, counsel, or procure the making or signing thereof, or who shall aid or abet any other person in the making or signing thereof, shall, upon proof of any such offence being made before a court-martial, "*be cashiered and rendered incapable of further employment in His Majesty's naval service.*"

It will be observed that this article leaves no discretionary power in the court-martial, as to the punishment to be awarded to persons guilty of the offences specified. If the charge of false musters should be proved, the Court have no alternative — they must sentence the offender to be "*cashiered and rendered incapable of further employment in Her Majesty's naval service.*" The sentence passed on Captain Norway was laid before His Majesty's attorney and solicitor-general, who were of opinion, that as it was not in conformity with the Act of Parliament, it could not legally be carried into execution.

A court-martial has no power to sentence an officer to be reduced from a superior to an inferior rank, when such reduction involves the necessity of issuing a new commission or warrant to the party

so sentenced. As an exemplification, we may quote the case of First-Lieutenant Franklin, of the Royal Marines, serving on board His Majesty's ship, "Cæsar," who was tried by court-martial, in July, 1800, on charges exhibited against him by Captain Sir James Saumarez, for being absent from the said ship without leave. The Court being of opinion that the charges were proved, adjudged Mr. Franklin to be dismissed from His Majesty's ship, "Cæsar," and to be reduced in his rank to the bottom of the list of *second lieutenants* of His Majesty's marine forces.

The opinion of the solicitor of the Admiralty respecting this sentence was as follows:—"I am of opinion that this sentence cannot be considered as legal, inasmuch as it not only takes away the commission already possessed by the lieutenant, but, in effect, directs His Majesty to grant another, which certainly cannot be within the jurisdiction of the court-martial. The only way in which I can think the sentence may be supported as a legal sentence, is to consider that part of it which dismisses Lieutenant Franklin from His Majesty's ship 'Cæsar,' as *the sentence*, and the rest as merely recommendatory. This mode, however, of taking a sentence, as it were, to pieces, and giving effect to part of it as the legal sentence of the Court, and denying the validity of the other part which accompanies it, by way of qualification, when the whole purports to be delivered in one strain of authority, is certainly not without its objections.

The grant of a new commission must be the act of His Majesty's pleasure, and not of the authority of the court-martial."

In February 1805, Captain Richard A. Bennett, of His Majesty's ship "Tribune," was tried by court-martial at Portsmouth for not having fully executed certain instructions which he had received from the Lords Commissioners of the Admiralty. The Court declared the charge to be proved against Captain Bennett; but it appearing to the Court that, in deviating from their Lordships' orders, he was actuated by the purest motives for the good of His Majesty's service, they *adjudged him to be acquitted.* The legality of this sentence was questioned, and the opinion of the crown lawyers was requested, "whether it is competent in the Court to acquit a prisoner whom they have declared to be guilty of disobedience of orders?"

Opinion.

"We collect from the sentence of the court-martial, that they must have thought the defendant had disobeyed his orders, but that he had done this from a persuasion that, under the circumstances which then existed, the good of the service required it. This motive might have furnished the court with a sufficient ground for imposing the slightest punishment upon the defendant, after conviction, or perhaps for petitioning His Majesty to pardon the offence altogether, but we do not think it justified a sentence of acquittal. We are confirmed in this

opinion by the judgment of Lord Mansfield and Lord Loughborough, in the case of *Sutton* v. *Johnstone*, in which they lay it down as clear and indisputable law, that *nothing can excuse a subordinate officer in the disobedience of orders but a physical impossibility to obey them.* We therefore think that the court-martial have drawn an improper conclusion from the premises stated in their sentence; but as they do in terms acquit the defendant, and as it was evidently their intention so to do, we think that he is entitled to the benefit of that acquittal, and cannot be brought to another trial.

"S. PERCEVAL.
"V. GIBBS.
"T. JERVIS.

"March 15. 1805."

"If the state and condition of a ship be such that an order given *cannot be obeyed*, the not obeying in that case is not disobedience, and requires no justification, *but there ought to be an acquittal upon the ground of the charge of disobedience not being made out.* But if a subordinate officer, having received an order *which might be obeyed*, does not obey because, regard being had to the state and condition of his ship, he is of opinion that such an order ought not to have been issued to him, in this case *the not obeying is disobedience* in my apprehension, and he would be to justify himself as he could."*

"It cannot be disobedience where obedience is

* Eyre, Baron, *Sutton* v. *Johnstone*, 1 D. & E. 501.

impracticable or legally improper, for the term implies a crime, whereas there can be no criminality in omitting to do what is physically impossible or forbidden by law. The court-martial cannot justify disobedience to a lawful command under any circumstances, for it is directly repugnant to the 22nd article of war, and to the oath which they take to duly administer justice according to the laws in force for the government of His Majesty's ships, vessels, and forces by sea."*

A court-martial cannot legally sentence an officer to be "*dismissed from his ship, put upon half pay, and rendered incapable of being again employed in Her Majesty's ships or vessels at sea.*" Such a sentence would be illegal, because, on declaring an officer to be *incapable of serving again*, the Court have not the power to direct that he shall notwithstanding receive his half pay; they can only *recommend* that he should be so far indulged. And such a recommendation would scarcely be consistent with the sentence, the half pay being not merely a reward for past services, but a retainer for future services. The 3rd article of the order in Council of September 15, 1715, for establishing the half pay, expressly directs that no officer shall be entitled to that allowance who shall be dismissed from His Majesty's service by the sentence of a court-martial.

When the charges involve the imputation of several distinct offences, and the finding is, that those

* *Sutton* v. *Johnstone*, 1 D. & E. 501.

charges have been in part proved, the court, in their sentence, should be careful to express of what the party accused has been found guilty, or acquitted, in order that it may be seen whether the punishment they award is a legal punishment for the crime of which they find the prisoner guilty.

When the form of the sentence, in cases where some of the charges are bad and some good, is such that it cannot be distinguished how far the Court has proceeded on the bad, and how far on the good charges, the whole judgment must necessarily be a nullity. It is imperative in such cases that the sentence should clearly express on which of the charges the judgment of the Court is founded. Furthermore, when the defendant is tried on several charges, the sentence must pronounce him to be *acquitted* of such as are not proved. "In trover and conversion of goods, if the defendant be found guilty of part, and of part not guilty, but no judgment is given for that of which he is so found not guilty, as it ought to be, this is erroneous." *

In the case of the *King* v. *Hungerford*, the defendant was indicted for feloniously and burglariously entering a dwelling-house and stealing goods therein of the value of six pounds. The verdict was, not guilty of the burglary, but guilty of stealing in the dwelling-house. The Judges held that this finding was sufficient to warrant a capital punishment.†

"Upon a count in an indictment against eight

* Viner's Abridgement, "Error," B. b. pl. 18.

† 2 East, P. C. 518.

defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that four of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law, and repugnant; inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas, by the same finding, it appears that the other five were guilty of conspiring to effect only some of these objects."*

If the sentence states only one offence, and then proceeds to declare the defendant guilty of two offences, it would be impossible to separate the punishments awarded so to apply a portion to the one offence which is charged, and the other portion to the offence which is not charged, and therefore the sentence would be altogether void. For instance, if a person were tried for disobedience of orders, and the Court find him guilty, and on evidence received, declare him to be guilty also of drunkenness, their sentence, whatever it might be, could not be carried into execution; for it would appear on the face of it, that they had tried him for an offence with which he was never properly charged, and consequently, of which they could have no cognizance. Such a sentence, in fact, would not only be totally invalid, but the members of the Court from whence it emanated would be liable to an action at common law, for having ex-

* Case of *O'Connell and others*, 11 C. & F. 155.

ceeded their judicial authority. The principle is the same whether the offence not charged (but of which the Court may have found the prisoner guilty) be one for which capital punishment might be awarded, or a minor offence subject only to minor punishment, because no such offence would appear to have been charged.

As the minutes of the court-martial can never be resorted to to supply the defects appearing on the sentence, we would urgently recommend the most scrupulous attention on the part of every member as well as the Judge Advocate in drawing up this important document.

A court-martial has not power to order the bodies of criminals to be hung in chains; if there is any such power it is in Her Majesty, as having the right to dispose of the bodies of malefactors condemned to death after their execution. Fourteen men belonging to His Majesty ship "Saturn" were tried for mutiny at Plymouth, in July 1797. The Court adjudged that the bodies of two of them who were sentenced to suffer death should, after execution, be hung in chains; but the latter part of the sentence was not allowed to be carried out.

In those cases where the Court have a discretionary power vested in them as to the punishment to be inflicted on offenders, their award must be in conformity with the usage of the service. The Act 22 Geo. 2. cap. 33. authorises them to

order imprisonment for any term not exceeding two years; but they cannot superadd that the prisoner should be kept to hard labour or in solitary confinement for the whole or any part of such term; the sentence must be confined simply to imprisonment.* Neither can a court-martial legally adjudge a person to be transported as a felon. The learned Blackstone, in his "Commentaries on the Laws of England," observes, "No power on earth, except the authority of Parliament, can send any subject of England *out* of the land against his will; no, not even a criminal. For exile and transportation are punishments at present unknown to the common law; and whenever the latter is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, *or else by the express direction of some modern act of parliament.*"†

The 27th sect. of the Act 5 & 6 Vict. cap. 98. enacts, that any person who shall have been convicted by a naval court-martial, and sentenced to imprisonment, or who, in consequence of his sentence, shall be liable to be detained until execution of his sentence can be had, shall be committed to, and imprisoned in, the common gaol of the county in which he shall be first landed, or shall first arrive in England, or of the county in which such court-martial shall have been holden.

If the court-martial should be held out of Eng-

* *Vide* Appendix, No. XVI. † Ibid.

land, or in England, but without the body of any county, the sentence should be, that the prisoner be confined *in one of Her Majesty's gaols in England* for the period, &c.

If the Court think proper to recommend a prisoner to mercy, the ground on which they make such recommendation should be stated in a letter from the president, either to the secretary of the Admiralty, or to the commander-in-chief. The following case will perhaps clear up any doubts that may exist as to the obligation of the Court in this respect.

On the 2nd of July, 1801, a court-martial assembled on board the "Gladiator," in Portsmouth Harbour, for the trial of William Johnson and Adiel Powelson, alias Henry Poulson, formerly of His Majesty's ship "Hermione," for having murdered the officers of the said ship, or been aiding and assisting therein, and for having aided and assisted in carrying the said ship to La Guayra and delivering her up to the enemy. The Court found the charges fully proved against Powelson, and partly proved against Johnson; the Court, therefore, adjudged them both to suffer death, but stated, in a letter signed by all the members, addressed to the secretary of the Admiralty, that there were circumstances in the case of William Johnson which led them humbly to recommend him to His Majesty's mercy. Rear Admiral Holloway, who was president of the Court, was requested to state the particular circumstances which ap-

peared so favourable to the prisoner Johnson as to induce them to recommend him to mercy. This he declined doing, on the ground that any revelation on his part would be inconsistent with the oath he had taken. The case was then submitted to the law officers of the Crown, who delivered the following opinion:—

"We have considered the statute of the 22 Geo. 2. cap. 33., and the oath therein prescribed to be taken by the members of courts-martial, and we are of opinion that such oath, in the particular above referred to, was only meant to protect the individuals composing such Courts against the inconvenience which might attend a disclosure of the manner in which they should give their votes; but as the same statute has directed that no sentence of death given by any such court-martial (except in cases of mutiny) shall be put in execution till after a report of their proceedings shall have been made to the Lords Commissioners of the Admiralty, and as the Court has, in point of fact, made a report of their proceedings in the present instance, we are of opinion that, upon further consideration, they cannot have any objection to disclosing the circumstances upon which they have been induced to ground their recommendation to mercy, unless such disclosure would have the effect of revealing, directly or indirectly, any agreement or compromise amongst themselves, and thereby of revealing the votes of the individual members; and if that would be the effect in the present instance, the disclosure

cannot, with propriety, be called for; otherwise there seems to be no objection to requiring it.

" EDWARD LAW.
" J. JERVIS.
" S. PERCEVAL.

"July 7. 1801."

When the court-martial adjudge a person to suffer death, the article of war on which their judgment is founded should be stated in the sentence.*

If the charges are found to be proved by a bare majority, the minority are not to be precluded from voting on the question of punishment. This rule is highly favourable to the prisoner, for, of course, those members who consider that the charges have not been proved, will do all in their power to mitigate the penalty attached to the offence which the majority declare him to be guilty of.

When charges are preferred against a person without any foundation, the Court may, in its discretion, pronounce them to be cruel, malicious, vexatious, frivolous, or ill formed, according to the circumstances of the case. The term *cruel*, however, could not, with propriety, be used on the acquittal of an officer who has been tried on charges exhibited against him by his inferior. Innumerable instances might be cited where courts-martial have thus marked their disapprobation of a prosecutor's conduct in preferring

* *Vide* Appendix I.

charges when not a tittle of good evidence has been adduced to support them, or when the prisoner has so clearly refuted them as to leave no doubt of his entire innocence; or when it is apparent that the prosecutor has been influenced by unworthy motives in bringing the charges. With either of the above words appended to it, tending, as they do, to remove the prejudice with which society is too apt to look upon men who have been *accused* of great offences, the sentence becomes the more valuable to the person acquitted, and may, in some degree, serve as a recompense for the trouble and anxiety he has undergone in clearing himself from a false accusation.

It was determined in the Court of Common Pleas, November 12. 1806, before Sir James Mansfield, C. J., in an action for libel brought by Captain Jekyll, of the 43rd regiment, against Sir John Moore, the president of a court-martial, that he was not liable to an action for a libel for having delivered a sentence and declaration to the Judge-Advocate to the following effect, on certain charges, the said Captain Jekyll had preferred against Colonel Richard Stewart of the same regiment, namely, "That he, the said Colonel Richard Stewart, is not guilty of either charges, and the Court do most fully and most honourably acquit him. The Court cannot pass without observation the malicious and groundless accusations that have been produced by Captain Jekyll against an officer, whose character has, during a long period of service, been so irre-

proachable as Colonel Stewart's; and the Court do unanimously declare that the conduct of Captain Jekyll, in endeavouring to falsely calumniate the character of his commanding officer, is most highly injurious to the good of the service." Sir James Mansfield said: "In order to enable the Court to decide upon the charges submitted by the King, they must hear all the evidence, as well on the part of the prosecution as of the defence, and after hearing both sides are to declare their opinion whether there be any grounds for the charges. If it appear that the charges are absolutely without foundation, is the president of the Court to remain perfectly silent on the conduct of the prosecutor? Or can it be any offence for him to state that the charge is groundless and malicious? It seems to me, that the words complained of in this case form part of the judgment of acquittal, and consequently no action can be maintained upon it." *

The causes for which the sentence of a court-martial may be brought under review of a superior judicature are the same which, in the civil courts of England, authorise either the granting of a new trial, or an arrest of judgment; that is to say, if the sentence or verdict shall have been manifestly without, or contrary to, evidence; or if it shall have been contrary to, or unauthorised by law; if the penal award be beyond measure exorbitant or severe; if the jury or judges have been corrupted, &c. But in all such cases, as the presump-

* M'Arthur, vol. ii. p. 206.

tion is strongly in favour of the judgment, the superior court will not entertain the appeal, or authorise any review of the proceedings unless on the most pregnant or positive grounds for supposing that the merits have not been fairly discussed, and that the decision is not agreeable to the justice and truth of the case.*

* 3 Black. Comm. 386. edit. 1800.

CHAP. XVIII.

EXECUTION OF THE SENTENCE.

Execution of the Sentence. — Commander-in-Chief may peruse the Minutes. — Not authorized to pardon Offenders sentenced to Punishment by Court Martial: nor to remit Sentences: but may suspend the Execution thereof for a time. — Sentence of Death passed in the Narrow Seas. — In Squadrons detached from the Commander-in-Chief. — In cases of Mutiny. — Pardon granted by Her Majesty on certain Conditions.

THE usual mode of executing the sentence of death is by hanging the party so sentenced by the neck at the yard-arm of such of Her Majesty's ships as the Lords Commissioners of the Admiralty, or the commander-in-chief of the fleet, shall direct. No particular time or ship is specified in the sentence, in case an emergency of the public service should render it inconvenient to carry out the same on the day or at the place specified.

The safety of those who are to direct the execution of the sentence of death, as well as the anxious attention which the country will demand from the officer having authority over the life of a fellow-subject, demands that in all cases the commander-in-chief should carefully peruse the minutes of the court-martial, and satisfy himself that there are no

legal objections to the validity of its judgment, or grounds on which he should respite the execution of the sentence until the receipt of instructions from the Lords Commissioners of the Admiralty.

In 1845, Her Majesty's Attorney-General, and Solicitor-General, and Counsel for the affairs of the Admiralty, were desired to state their opinion as to what extent, and in what cases, naval commanders-in-chief abroad have the power of remitting sentences and pardoning persons sentenced to punishment by courts-martial.

Opinion.

"We are of opinion that naval commanders-in-chief on foreign stations have no power to pardon persons sentenced to the punishment of death by court-martial. But as the execution of the sentence is entrusted to them without any limitation as to the time within which it is to be done, they may, when they think proper, report them to the Lords Commissioners of the Admiralty, and suspend the execution thereof until the pleasure of Her Majesty on the subject be made known to them.

"We are also of opinion, that in all other cases the naval commanders-in-chief on foreign stations, have no power to remit sentences, either in the whole or in part, and that all remissions made must be done on their own responsibility, subject to the approbation of Her Majesty."

In the 19th section of the Act 22 Geo. 2. cap. 33., it is enacted, that no sentence of death given

by any court-martial within the narrow seas (except in cases of mutiny) shall be put in execution till after the report of the proceedings of the Court shall have been made to the Lords Commissioners of the Admiralty, and their directions shall have been given thereon. If the court-martial shall have been held beyond the narrow seas, the sentence of death shall not be carried into execution but by order of the commander of the fleet or squadron wherein sentence was passed; and in cases when sentence of death shall be passed in any squadron, detached from any other fleet or squadron upon a separate service, then such sentence of death (except in cases of mutiny) shall not be put in execution but by order of the commander of the fleet or squadron from which such detachment shall have been made, or of the Lords Commissioners of the Admiralty; and in cases where sentence of death shall be passed in any court-martial held by the senior officer of five or more ships which shall happen to meet together in foreign parts, such sentence of death (except in cases of mutiny) shall not be carried into execution but by order of the Lords Commissioners of the Admiralty.

Competent authorities have given it as their opinion, that the power implied in the above section of putting the sentence of death into immediate execution, without waiting for the instructions of the Lords Commissioners of the Admiralty, or the commander-in-chief of the fleet, was intended only in cases where a mutiny actually

existed, which the immediate execution of the sentence might lead to quell, but not in cases where the acts of mutiny for which the prisoners are tried were committed some time previous to the trial. If the mutiny is quelled only in a sufficient degree to enable the authorities to act against the mutineers, as in the case of the fleet in Bantry Bay, in 1801, then it would be proper that such sentences of courts-martial should be carried into immediate execution.

The Act 37 Geo. 3. cap. 140. authorizes Her Majesty to grant conditional pardons to persons under sentence by naval courts-martial, and to regulate imprisonment under such sentences. The first section of the Act declares, that if His Majesty shall be graciously pleased to extend his mercy to any offender liable to the punishment of death by the sentence of a naval court-martial, upon condition of transportation, or of transporting himself beyond seas, or upon condition of being imprisoned within any gaol in Great Britain, or on condition of being kept to hard labour in any gaol, or house of correction, or penitentiary house, or on any river, the judges of the Courts of King's Bench, Common Pleas, &c., upon such intention of mercy being notified in writing by one of His Majesty's principal secretaries of state, are to allow the offender the benefit of such conditional pardon, in the same manner as if a conditional pardon had passed for that purpose under the great seal. The powers of this Act are confirmed and extended by the 56 Geo. 3. cap. 5.

CHAP. XIX.

OF ARREST, ETC.

Commanding Officers authorised to place Persons in Arrest for Misbehaviour. — Arrest should not be of a more severe Description than the Case requires. — Complaint to be preferred to Senior Officer at the earliest opportunity. — Circumstances regarding the Complaint to be fully explained. — The Admiralty or Commander-in-Chief to use their Discretion with regard to trying the Party complained of. — Appointment and Duties of Provost-Marshal.

By the 8th article of the Admiralty Instructions (chap. i. p. 3.), commanding-officers are authorised to place any person in arrest who shall disobey orders, or otherwise misbehave himself. This course is usually adopted preparatory to bringing an officer to trial: — If the offence with which he is charged be of a capital or very flagrant nature, it is customary to confine him to his cabin or mess-place, with liberty to walk on deck for exercise at certain periods; but if, on the contrary, the charges are comparatively of trifling importance, it would not generally be considered necessary to place any restraint upon him other than by confining him to his ship. Commanding-officers should be careful that the arrest is not of a more severe description than the circumstances of the case will justify, as for any undue severity they subject themselves to a court-martial for a breach of the 30th article of

war. Lord Mansfield, in deliveting his charge to the jury in the case of *Wall* v. *Macnamara*, said, "In trying the legality of acts done by military officers in the execution of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form if their intention appears by the evidence to have been upright; it is the same as when complaints are brought against inferior civil magistrates, such as justices of the peace, for acts done by them in the exercise of their civil duty. There the principal inquiry to be made by a court of justice is, how the heart stood? and if there appears to be nothing wrong there, great latitude will be allowed for misapprehension and mistake. But on the other hand, if the heart is wrong, if cruelty, malice, and oppression, appear to have occasioned or aggravated the imprisonment, or other injury complained of, they shall not cover themselves with the thin veil of legal forms, nor escape, under the cover of a justification the most technically regular, from that punishment which it is your province and your duty to inflict on so scandalous an abuse of public trust. It is admitted that the plaintiff was to blame in leaving his post; but there was no enemy, no mutiny, no danger. His health was declining, and he trusted to the benevolence of the defendant to consider the circumstances under which he acted. But supposing it to have been the defendant's duty to call him to

a military account for his misconduct, what apology is there for denying him the use of the common air in a sultry climate, and shutting him up in a gloomy prison, when there was no possibility of bringing him to trial for several months, there not being a sufficient number of officers to form a court-martial? These circumstances, independent of the direct evidence of malice, as sworn to by one of the witnesses, are sufficient for you to presume a bad malignant motive in the defendant, which would destroy his justification, had it even been within the powers delegated to the defendant by his commission."*

Swinton v. *Molloy*, C., was an action of false imprisonment, brought by the plaintiff, as purser of the "Trident" man-of-war, against the defendant, who was his captain. The defendant pleaded a justification for a supposed breach of duty; but it appearing in evidence that the defendant had imprisoned him for three days without inquiring into the matter, and had then released him on hearing his defence, Lord Mansfield said, that "such conduct on the part of the defendant did not appear to have been a proper discharge of his duty, and therefore that his justification had failed him under the discipline of the navy. But suppose that Captain Molloy, instead

* In 1823, Captain Hunn, of H. M. S. "Tweed," placed Mr. Hannaford, the master, under arrest, and neglected to inquire into the complaints against him until three days afterwards. On arriving in England the master brought an action, and obtained a verdict against Captain Hunn, with 300*l.* damages.

of releasing the plaintiff on hearing his defence, had kept him confined till he came to England, and had then made a charge against him, in order to justify himself, the same policy which suffered an action of false imprisonment in that case for the incautious, though upright, conduct of the defendant, would have supported an action on the case, founded on cool deliberate malice and injustice, not covered by a pretence of discipline."*

Information of the arrest should be forwarded at the earliest opportunity to the secretary of the Admiralty, or to the commander-in-chief of the squadron, where there is one, so that the prisoner may be brought to trial as soon as the convenience of the public service will admit.

The officer who makes the complaint should explain the circumstances of the case as fully and clearly as possible, in order that the authorities may judge whether or not it is advisable that the matter should be brought before a court-martial. On the occasion of Vice-Admiral Sir Hugh Paliser preferring charges against Admiral Keppel, the Lords of the Admiralty denied that they had any discretionary power with regard to ordering the court-martial, but that on receiving a complaint, they had no alternative but to issue the necessary directions for the trial of the party complained of. This doctrine, however, can never be maintained, either in point of law or expediency. The act

* In this case there was a verdict for the plaintiff, damages 1000*l.* (1 *D. & E.*, 537.)

which constitutes courts-martial empowers the Lords Commissioners of the Admiralty to appoint officers in the ports of Great Britain or Ireland to hold those courts "*as there shall be occasion:*" who is to judge of the occasion, except the party to whom the complaint is preferred, and from whom the order for trial must emanate. The commander-in-chief of a fleet on a foreign station may be considered as the chief magistrate of the community placed under his command; if a frivolous, vexatious, malicious, or ill-founded complaint is brought to his notice, and one on which he believes no conviction could legally follow, he should exercise the discretion which a magistrate in a similar case on shore would exercise, and decline to send the case before a jury. The discipline and the efficiency of the navy would be ruined if litigious people could, as a matter of right, demand that all their trivial complaints and bickerings should be made the formal subjects of inquiry at courts-martial; it would encourage such people in quarrelling, by investing their disputes with an importance which they never deserved. The more often these courts are held, the more often will they be required; by a constant repetition, the minds of both officers and men will become familiarised with them, and the effect produced by the solemnity of the proceedings will be lost.

As soon as the commander-in-chief issues his order for the trial, he appoints some person (usually the master-at-arms of the flag-ship) to act as pro-

vost-marshal, whose duty it is to take charge of the prisoner, and keep him in safe custody until he shall be delivered by due course of law. This officer brings the prisoner before the Court, and, during the trial, stands beside him with a drawn sword. The 32nd article of war enacts, that "No provost-marshal belonging to the fleet shall refuse to apprehend any criminal whom he shall be authorised by legal warrant to apprehend, or to receive or keep any prisoner committed to his charge, or wilfully suffer him to escape, being once in his custody, or dismiss him without lawful order, upon pain of such punishment as a court-martial shall deem him to deserve; and all captains, officers, and others in the fleet, shall do their endeavour to detect, apprehend, and bring to punishment all offenders, *and shall assist the officers appointed for that purpose therein*, upon pain of being proceeded against and punished by a court-martial, according to the nature and degree of the offence." The duty of executing the final sentence of the law devolves upon the provost-marshal.

CHAP. XX.

OBSERVATIONS ON THE FRAMING OF THE CHARGES.

At courts-martial, the indictment, or, as it is commonly called, the charge, is a written accusation against some person or persons for a breach, or an omission, of the laws relating to the government of the navy. In a former chapter we endeavoured to point out under what circumstances these laws are applicable to persons in the fleet; we now proceed to explain the forms proper to be observed in framing the charge.

1st. It must specify some particular act or omission which constitutes a crime; and the defendant must be positively charged therewith: for instance, in uncleanness, scandalous actions, fraudulent behaviour, unofficer-like conduct, cowardice, disrespect, &c., it would not be sufficient to accuse the defendant *generally* of these offences, but the precise facts on which the complaint is founded must be set forth, so that the accused may distinctly know on what points he has to defend himself.

It is a rule of law that "every indictment must charge a man with a particular offence, and not with being an offender in general."*

* Hawkins's Pleas of the Crown, b. 2. c. 25. s. 59.

"Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him." . . . "It is part of the duty of those who administer justice to require that the charge should be specific, in order to give notice to the party what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of multifarious and complicated transactions."*

An order for a court-martial to inquire into the conduct of the officers and men of a ship lost is no charge; and a sentence given thereon would be null and void: *it would be a mere court of inquiry*, and therefore could not legally award any description of punishment. (*Opinion of Law Officers on Courts-Martial held on the Officers and Crews of H.M.S. "Centurion" and "Diomede,"* April, 1795.)

2ndly. The Christian name or names and the surname of the defendant must be written in full. If he be known by two names, and it be doubtful which is his proper name, both must be inserted; thus, "Charles Johnson, otherwise called Henry Jones." If two men of the same name are borne on the books of a ship, they are distinguished by numbers; as, "John Smith (the first)," "John Smith (the second)." The rank or quality of the accused, and the ship to which he belongs, must also be stated.

3rdly. It must be equally certain as to the person against whom the offence is alleged to have

* Lord Ellenborough, in the Case of the *King* v. *Perrott*, 2 M. & S. 379.

been committed; as, for the murder of "Edward Hammond." But if the party killed have no name, or the name cannot be ascertained, the charge should be for the murder of "a certain person whose name is unknown." The 20th section of the Act 7 Geo. 4. c. 64. enacts, "that if the party injured be designated by a name of office, or other descriptive appellative, instead of his proper name, judgment shall not be stayed on that account."

(N. B. If it appear in evidence that the party murdered is misnamed in the charge, or that it is a different person to the one mentioned who has been murdered, the defendant must be acquitted; but if the spelling only of the name be wrong, so that the pronunciation be the same, it would be immaterial. And if the party murdered be described as a person unknown, and it appear in evidence for the prosecution that his name is known, and that the prosecutor, by reasonable diligence, might have known it, the defendant cannot be convicted.)

4thly. The day of the month on which the offence was alleged to have been committed should be inserted in words at length. If there be any doubt as to the precise time, the charge should be laid on a certain date, "or on or about that date." *The place*, in many instances, is material, inasmuch as the Act 22 Geo. 2. gives courts-martial jurisdiction only over persons in the fleet who commit crimes in certain situations therein expressed. *And time* is material, because the statute contains a limitation within which com-

plaints in writing shall be made. By the 20th section of the Act 7 Geo. 4. c. 64., it is enacted, that no judgment upon any indictment, or information for any felony or misdemeanor, shall be stayed or reversed for omitting to state the time at which the offence was committed, in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened.

If time and place be necessary ingredients of the offence, they must be correctly stated. In desertion, time is an ingredient of the offence, but place is not, for courts-martial may take cognizance thereof whether committed within or without Her Majesty's dominions. In a case of murder, *place* is material, not only as regards where the crime was committed, but where the death occurred; because, as we have before stated, it depends upon these circumstances whether the Court have or have not jurisdiction over the accused.

(N. B. Where an offence is proved to have been committed prior to the date laid in the charge, the Court should be very careful to ascertain whether the prisoner was at the time subject to their jurisdiction.)

5thly. When the charge is founded on any written letter, order, or other document, the same should be inserted *verbatim;* but when the accusation is based on certain passages in writings, it is

sufficient to insert such passages only as apply to the case. If the document be used *verbatim*, it should be introduced with the words "*according to the tenor following;*" and if a part only be required, with the words "*in substance as follows.*"

6thly. The statute or article of war said to have been violated need not be stated.

7thly. No more than one crime or offence should be inserted in one charge, except where the same are noticed together in the article of war pertaining thereto.

8thly. Where particular words are used in the articles of war in reference to crimes, the same should be adopted in the charges: for instance, in an accusation of burning any magazine, or vessel, &c., not belonging to an enemy, the word "maliciously" must be added; for the loss of a ship it should be, for having by "wilfulness, negligence, or other default," &c.; for a breach of the 28th article of war, the offender must be charged with "murder," not killing; charging a person with having committed an unnatural crime would not be sufficient to warrant a conviction, the offence must be designated according to the terms used in the 29th article; on the 30th article, the charge must be for "robbery," not theft; and on the 33rd article, the words "cruel and oppressive" should be used, not tyrannical.

9thly. Where several persons are concerned in the same crime, they may be included in one charge, and tried together.

CHAP. XXI.

FORM OF CHARGES.

Form of Charges. — Remarks on the Crime of Desertion. — Receiving Merchandize in Her Majesty's Ships. — Officers who take no Military Command, to be considered within the Meaning and Protection of the 19th and 22nd Articles of War. — Remarks on the Crime of Mutiny. — Subordinates striking their Superiors. — Murder. — Manslaughter. — Unnatural Offences. — Robbery.

THE charges should be made out on a separate sheet of paper, enclosed in a letter of complaint, and headed as follows: —

" Charges exhibited against James Thomas Johnson, boatswain's mate, of and belonging to Her Majesty's ship ' Diamond,' by Francis Charles Wills, Esquire, captain of the said ship."

First charge.

" For that he, the said James Thomas Johnson," &c.

Second charge.

" For that he, the said James Thomas Johnson," &c.

" F. C. WILLS,
" Captain of Her Majesty's ship ' Diamond.' "

*Charge *, and Article of War on which the same is framed.*	*Punishment in Case of Conviction, Remarks, &c.*
ARTICLE 1.	
For that he, the said ———, being in actual service and full pay in the fleet, and captain of Her Majesty's ship "Diamond," did, on the first, eighth, and fifteenth days of January, 1802, respectively, neglect to cause the Lord's Day to be observed, according to law, on board the said ship, by (*here insert the particulars of the circumstances on which the charge is founded*).	In the 1st article of war, captains are directed to cause public worship, according to the liturgy of the Church of England, to be performed in their respective ships, and to take care that the Lord's Day be observed according to law. The Act specifies no punishment for those who fail in this respect, and, therefore, the Court must use their own discretion with regard to the punishment to be awarded.
ARTICLE 2.	
For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did [1], on the —— day of ———, 18—, behave in a scandalous and unclean manner on board the said ship, by (*here insert the particulars of the offence.*) [1] *Or,* was, on the —— day of ——, 18—, drunk on board the said ship.	Such punishment as the nature and degree of the offence shall deserve.
ARTICLE 3.	
For that he, the said ———, being in actual service and full	Death; or such other punishment as the nature and

* Where several offences are noticed in the same article, it has not been considered necessary, except in a few cases, to give more than one form of charge.

pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, without leave from the Queen's Majesty, or the commissioners for executing the office of lord high admiral, or the commander-in-chief, or his commanding officer, hold intelligence with the enemy at —— (*here insert the particulars of the communication held.*)

degree of the offence shall deserve.

ARTICLE 4.

For that he, the said ———, being in actual service and full pay in the fleet, and ——, of and belonging to the Her Majesty's ship ——, did, on the —— day of ———, 18—, receive a message from the enemy at ——, in substance as follows (*here insert the purport of the message*), which message he, the said ———, did fail to communicate to his superior officer within twelve hours after the receipt of the same, he, the said ———, having had opportunity so to do.

Death; or such other punishment as the nature and degree of the offence shall deserve.

ARTICLE 5.

For that he, the said ———, did[1], on the —— day of ——, 18—, endeavour to corrupt ——, ——, seamen of and belonging to Her Majesty's ship ——, in commission, to betray their trust, by (*here*

Death; or such other punishment as the nature and degree of the offence shall deserve.

*insert the particulars on which the charge is founded.**

[1] *Or,*

was, on the —— day ———, 18—, found on board Her Majesty's ship ——, in the nature of a spy, to, &c.

Article 6.

For that he, the said ———, being in actual service and full pay in the fleet, and ——, of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, relieve and assist the enemy at

Death; or such other punishment as the nature and degree of the offence shall deserve.

* The Act 1 Vict. cap. 91., entitled "An Act for abolishing the Punishment of Death in certain Cases," repeals that part of the Act 37 Geo. 3. cap. 70. which enacts that "any person who shall maliciously and advisedly endeavour to seduce any person or persons serving in His Majesty's forces, by sea or land, from his or their duty and allegiance to His Majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make, or endeavour to make, any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjuged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy;" and provides that, if any person shall be convicted of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years. But as this Act (1 Vict. cap. 91) does not make any reference to the 22 Geo. 2. cap. 33., or to any of the subsequent acts relating thereto, its provisions cannot be considered as extending to offences of the description in question brought under the cognizance of naval courts-martial.

——, by (*here insert the particulars on which the charge is founded*).

ARTICLE 7.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, fraudulently withhold from the Court of Admiralty (*or Vice-Admiralty, as the case may be*) at ——, the undermentioned papers found on board the Spanish brig "Mercurio," taken as prize by Her Majesty's said ship ——, on the —— day of ———, 18—.

(*Here insert a description of the papers withheld.*)

To forfeit and lose his share of the capture, and to suffer such further punishment as the nature and degree of the offence shall deserve.

ARTICLE 8.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, fraudulently take out of the Spanish brig "Mercurio," prize to Her Majesty's ship ——, before the said Spanish brig was adjudged lawful prize in any admiralty court (*here insert a description of the goods taken*).

To forfeit and lose his share of the capture, and to suffer such further punishment as the nature and degree of the offence shall deserve.

ARTICLE 9.

For that he, the said ———, being in actual service and full

Such punishment as a court-martial shall think fit to inflict.

pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, ill-treat ———, who was taken prisoner in the Spanish brig "Mercurio," prize to Her Majesty's ship —— (*here insert the particulars on which the charge is founded*).

ARTICLE 10.

For that he, the said———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—,[1] upon signal of fight being made from ——, neglect to make the necessary preparations for fight, &c.;

[1] *Or,*

upon sight of —— French ships of the line, which it was his duty to engage, &c.;

or,

upon likelihood of engagement with —— French ships of the line, &c.

Death; or such other punishment as the nature and degree of the offence shall deserve.

ARTICLE 11.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, neglect to observe the orders of ——, his superior officer, for (*here insert the purport of the order which was disobeyed*).

Death; or such other punishment as the nature and degree of the offence shall deserve.

Charges for a breach of the 12th, 13th, and 14th articles, may be readily framed from the above.

ARTICLE 15.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, desert from the said ship to the enemy, taking with him ——[1], belonging to Her Majesty's said ship.

([1] *If the party deserted with any of the Queen's stores, they must be specified*).

Death; or such other punishment as the nature and degree of the offence shall deserve.

ARTICLE 16.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, desert from the said ship.

Death; or such other punishment as the nature and degree of the offence shall deserve.

According to the present regulations of the service, no person is deemed to be a deserter until he has been absent from his ship without leave for twenty-one days. If apprehended before that time, he should be tried for having absented himself without leave; and should it be deemed necessary, a charge might be added for *attempting* to desert. The Court would not be justified in passing sentence of death on persons guilty of these offences, which come under the 36th article of war.

It is not necessary to insert in a sentence passed on a person for *desertion* that he should be mulct of all the pay and advantages due, and arising to him at the period of his desertion; for this is consequent on his being found guilty, and cannot be considered as a second punishment for the same offence. The "R" had been affixed to his name, notifying his desertion in the opinion of the officer who affixed it: he is tried for this desertion; the court-martial find in effect that he did desert, and punish him for the same as the occasion may deserve. The effect of the sentence is, to continue the "R" against his name to the end of time, unless ordered to be removed by the Admiralty, and the wages and advantages are forfeited under the 11 Geo. 4. c. 20. s. 22., wherein it is enacted, that "if any officer, seaman, or marine, shall desert from His Majesty's service, he shall thereby lose and forfeit all wages, prize-money, and other allowances, benefits, and advantages to which he would otherwise have been entitled, as well in respect of his services in the ship from which he shall have deserted, as of those in all former ships in which he may have served."

ARTICLE 17.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, when charged with convoying and guarding ——, merchant-

Death; or such other punishment as the nature and degree of the offence shall deserve.

vessels, from —— to ——, fail to comply with his instructions in that behalf, by (*here insert the particulars on which the charge is founded*).

The capital punishment appears to be intended for those who refuse or neglect to fight in defence of the convoy when assailed, or run away cowardly and submit the ships to peril and hazard.

ARTICLE 18.

For that he, the said ——, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ——, 18—, without authority from the commissioners for executing the office of Lord High Admiral of Great Britain, receive (*or permit to be received, as the case may be,*) on board the said ship (*here insert a description of the goods received*) from (*here insert the place where the goods were received*), such goods not being for the use of the said ship, nor belonging to any merchant-ship or vessel which had been shipwrecked, or in imminent danger of being shipwrecked, and not necessary to be received, in order to the preserving them for their proper owner.

To be cashiered, and be for ever afterwards rendered incapable to serve in any place or office in the naval service of Her Majesty, her heirs, and successors.

This article was framed in order to put a stop to a custom which had grown into a great abuse, of captains of ships of war conveying merchandize

on freight, whereby the dignity of the service was compromised, and the efficiency of the ships materially impaired. In addition to the punishment which a court-martial is *directed* to award to persons guilty of a breach of this article, the 24th section of the Act subjects them to a penalty of 500*l.*, to be sued for and recovered in one of the superior courts.

ARTICLE 19.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, endeavour to make a mutinous assembly (*here insert where the offence was committed*), by (*here insert the particulars of the offence*).

Death; or such other punishment as the nature and degree of the offence shall deserve.

A charge founded on the latter part of the 19th Article would generally be worded as follows: —

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, behave with contempt to ——, his superior officer (*here insert where the offence was committed*), by (*here insert the particulars of the offence*).

Such punishment as the nature and degree of the offence shall deserve.

The above will form a guide for framing charges for a breach of the 20th, 21st, 22nd, and 23rd ar-

ticles. With regard to the 22nd and the latter part of the 19th Article, it may be useful to remark, that the law officers of the crown have given it as their opinion, that officers who take no military command are, notwithstanding, to be considered as officers within the meaning and the protection of those articles.*

It is not possible to draw any positive line between officers being in the execution of their office and the contrary; each case must in a great measure depend on its own particular facts and circumstances, to be judged of and determined by the court-martial; but generally it may be considered that an officer on board the ship to which he belongs, or employed on any service out of the ship, to which he has been ordered by his superior in command, is in the execution of his duty, within the meaning of the 22nd article of war.

In November, 1804, a court-martial assembled for the trial of Timothy Mahoney, a seaman belonging to the "Leviathan," on a charge of having "struck his superior officer on shore, in the dockyard at Portsmouth." Mr. Greetham, the Judge Advocate, informed the Court that he felt it to be his duty to state that he entertained considerable doubts of the competency of the Court to proceed to the punishment or trial of the offender, as it appeared from the letter of the complainant that the

* See also "Abstract of Courts-martial," Jas. Jones, seaman, of Her Majesty's ship "Blonde," tried in June, 1841, for striking the surgeon of that ship.

offence was committed in His Majesty's dominions on shore, in the dockyard; and he pointed out for their consideration the proviso in the Act 22 Geo. 2. c. 33., in which it is stated, " that nothing in this Act contained shall extend, or be construed to extend, to empower any court-martial to be constituted by virtue of this Act to proceed to the punishment or trial of any of the offences specified in the several articles contained in this Act, or of any offence whatsoever (other than the offences specified in the 5th, 34th, and 35th of the foregoing articles and orders), which shall not be committed upon the main sea, or in great rivers only, beneath the bridges of the said rivers nigh to the sea, or in any haven, river, or creek within the jurisdiction of the Admiralty, and which shall not be committed by such persons as at the time of the offence committed shall be in actual service and full pay in the fleet or ships of war of His Majesty:" that the article relative to striking a superior officer does not appear to be mentioned in the exceptions of the said proviso; and therefore Mr. Greetham contended that the court-martial had no jurisdiction over the offence. The law officers of the crown, to whom the question was referred, were of opinion that the prisoner could not be tried on a charge of having struck his superior officer *on shore within his Majesty's dominions.*

Had this man been tried for mutiny, there could have been no doubt as to the court being competent to take cognizance of the offence. Although the

crime of striking a superior officer is made the subject of a separate article of war, it is nevertheless identical with mutiny, as mentioned in the 22nd article. We have always understood mutiny to be the act of a subordinate depriving his superior of the lawful command and power attached to his office: amongst the various ways in which this may be done, surely one more effectual than by striking him could not be conceived. We fully admit that in the case of Mahoney, worded as the complaint against him was, the court-martial had no jurisdiction: he should have been charged with "*mutiny;*" and the fact of his having struck a superior officer when in the execution of his office would have borne out that charge.

In the year 1797, two men (Moorson and Dollison), belonging to the "Beaulieu," were tried by court-martial for *mutiny;* the first in striking Mr. Phillips, 3rd lieutenant, *when in the execution of his duty on shore at Deal;* the other for acts done on board the ship. Although, from the evidence, it appeared that the conduct of Moorson was of a very mutinous character after he was taken on board the Beaulieu, we find, from the following minute, which is entered on the proceedings, that the Court would not take cognizance of any other act of mutiny alleged to have been committed by him, except that which was mentioned in the charge, namely, "striking Mr. Phillips, 3d lieutenant, when in the execution of his duty on shore at Deal."

"A doubt arising whether the charge for mutiny

is confined to the striking of Lieutenant Phillips by Thomas Moorson, on the 24th of June, or to *other* acts of mutiny on that evening, the Court were of opinion that the charge against Thomas Moorson is confined to the striking of Lieutenant Phillips." *

"Mutiny is not a rebelling or rising only against a lawful authority; or an insurrection of soldiers to effect a purpose of their own, however otherwise lawful, by their *own means;* or debating or consulting together on any subject of discontent, arising out of a military measure, arrangement or command, with a view to the contravention of it, but a murmuring, or muttering even, against the exercise of authority, or about real or fancied grievances, in the hearing of the soldiery, to raise, or have a tendency to raise, ill humours or passions, and to stir up disquiet or sedition in the army.

"It is not, therefore, *necessarily* an aggregate offence, committed by many individuals; for, in the last instance specified, it may originate and conclude with a single person.

"So, mutiny may consist in the act of *one* person in opposing by force any act ordered to be done; and more decisively in any violence done to the person of any officer in the execution of his duty.

"For an offence of the latter description, Corporal M'Marran, of the 42d regiment, was tried by

* Both these men were found guilty. Moorson was sentenced to suffer death, but recommended to mercy; and Dollison to receive one hundred lashes.

a general court-martial in the month of March, 1813, on an express charge of *mutiny 'in discharging his piece at Lieut. A. Dickenson of the same regiment, and shooting him through the body while in the execution of his duty.*

" The Court having found the prisoner guilty of the criminal matter charged, sentenced him to be hanged.

" The unfortunate officer died in this instance of the wound inflicted on him,—so that the offender might have been proceeded against as for murder; though the latter mode of prosecution, for peculiar reasons, perhaps, was preferred."*

ARTICLE 24.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, wastefully expend the stores of the said ship by (*here insert the description of stores, and the manner in which they were expended*).	According to the nature and degree of the offence.

A charge of embezzlement, or appropriating the public stores to private purposes, may be framed from the above.

ARTICLE 25.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Ma-	Death; or such other punishment as the nature and degree of the offence shall deserve.

* Samuel's Military Law, p. 253.

jesty's ship ——, did, on the —— day of ———, 18—, unlawfully burn a certain ——, at ——, the same not then appertaining to an enemy, pirate, or rebel.

ARTICLE 26.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, through wilfulness (*or negligence, as the case may be*), run the said ship on shore at —— (*here describe the place where the ship was stranded*).

Death; or such other punishment as the offence shall be judged to deserve.

The capital punishment must have been intended for those only who should be found guilty of having *wilfully and maliciously* stranded one of the king's ships.

ARTICLE 27.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, negligently perform the duty imposed upon him, by (*here insert the particulars on which the charge is founded*).

Death; or such other punishment as the court-martial shall deem the case to require.

ARTICLE 28.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of

Death. On this charge the accused may be found guilty of manslaughter only.

and belonging to Her Majesty's ship ——, did, on the —— day of ——, 18—, when on board the said ship, wilfully, and of his malice aforethought, kill and murder (*name of the party killed*), of and belonging to ——, by stabbing him in the right side of the neck with a knife, giving to the said —— one mortal wound, of which mortal wound the said —— did languish until the —— day of ——, 18—, on which said —— day of ——, 18—, the said ——, in Her Majesty's ship ——, of the said mortal wound died.

Murder, according to the definition of Lord Coke, is, "when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied."

Where it appears that one person's death is occasioned by the hand of another, it is for that other to shew, either by evidence, or by inference from the circumstances of the case, that his offence is of a mitigated character, and does not amount to the crime of murder.*

"Every indictment of this kind may receive at the hands of the jury one of these terminations: First, that the prisoner is innocent; secondly, that he occasioned the death in such a way as implies blame, but still falls short of wilful murder; and,

* *Rex* v. *Greenacre*, 8. C. & P. 42.

lastly the party may be found guilty of murder. Before I go to the minute points of the case, it may be convenient to state the general principles upon which the law turns with regard to this subject. As soon as it is ascertained that one individual in the possession of his reason has wilfully taken away the life of another, the law's first presumption is that the party is guilty of wilful murder. This, you know, supposes the act to have been done maliciously; but with regard to malice, I should tell you, that it is not necessarily meant by that term, that at the moment the party killing has any old or present grudge against the deceased: it is not that at the moment he takes away his life he is acting on some deliberate design. It is only that the party has done the act, knowing that he has done it, and that the means are such as, in all human reason, are likely to produce death. If I were to take a loaded pistol, and fire it into that crowd, who are entirely strangers to me, — if I did that act deliberately, and death ensued, I should be guilty of murder. The law would say that I did it with *malice prepense*. I could not do it without having bad feelings, and a reckless heart. Every one must be presumed to intend the natural consequences of his acts. If you were to throw a stone at a window, it must be taken that you intend to break it, because it is a brittle substance. That being so, if you had heard nothing more than simply that the prisoner taking a knife in his hand, had stabbed his son, that would have put it upon

him to clear himself from the charge of murder. The law requires from him, and will allow him to shew that there were some mitigating circumstances, which alter the presumed character of the act, because it has at once a sacred regard for human life, and also a respect for man's failings, and will not require more from an imperfect creature than he can perform; and therefore, as it is well known that there are certain things which so stir up man's blood, that he can no longer be his own master, the law makes allowance for them. If, therefore, a person being stung and excited inflicts a fatal blow or wound, provided the provocation be sufficient, and acting upon him at the time, and recent, he will only be guilty of manslaughter; and in this the law does not depart from its original principle, because it then supposes that the individual was not guilty of *malice prepense*, but that what he did was done in a moment of overpowering passion, which prevented the exercise of reason; so that the general distinction is this; in the one case the man is cool, and must be taken to have malice; in the other, if he has had sufficient provocation, while it is fresh, then he has not malice. In some instances you must feel certain, from the acts of the party, that he had a grudge. Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison, and prepared the cup, although he should have had a quarrel with the party at the very time of administering it, you could not doubt that there was express and actual

malice. If a person has received a blow, and in the consequent irritation immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and, therefore, as in the case of poisoning, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows would go for nothing. So in the present case, if there was a stab given in consequence of a grudge entertained a day or two before, all that passed between these parties at the very time must go for nothing; for the simple reason, that the blows were not the cause of the crime. So that if you believe on the Monday or Wednesday before, the prisoner used the threats which have been sworn to, deliberately, then all the quarrel and the wrestling may be entirely dismissed from your consideration. I for one, however, am not disposed to pay much attention to declarations of this description. In some cases they may be deserving of consideration; but least of all if they proceed from a passionate mind, in that situation of life in which the prisoner is. Then I will suppose that all was purely unpremeditated till Chorlton came; and then the case will stand thus: the father and the son have a quarrel, the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if when he got up and threw the pick at the

deceased, he had at once killed him, I should have said that it was *manslaughter*. Now comes the more important question (the son having given no further provocation), whether in truth that which was in the first instance sufficient provocation, was so recent to the actual deadly blow, that it excused the act that was done, and whether the father was acting under the recent sting, or had had time to cool, and then took up the deadly weapon. I told you just now, he must be excused if the provocation was recent, and he acting on its sting, and the blood remained hot; but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, and the deadly nature of the weapon, the repetition of the blows, because though the law condescends to palliate human frailty, it will not indulge human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable controul over his passions."*

If a person being in possession of a deadly weapon, enter into a contest with another, intending at the time to avail himself of it, and in the course of the contest actually use it and kill the other, it will be *murder;* but if he did not intend to use it when he began the contest, but used it in the heat of passion, in consequence of an attack made upon him, it will be *manslaughter*. If he used it to protect his own life, or to protect

* Coleridge, J., summing up to the jury in the Case of *Reg.* v. *Kirham*, 8 C. & P. 116.

himself from such serious bodily harm as would give him a reasonable apprehension that his life was in immediate danger, having no other means of defence, and no means of escape, and retreating as far as he can, it will be *justifiable homicide.**

On a trial for murder, every person who was present at the time of the transaction which gives rise to the charge, ought to be called as a witness on the part of the prosecution; for even if they give different accounts, the jury should hear the evidence, and draw their own conclusions as to the truth.†

If one person kill another in a deliberate duel, under provocation of charges against his character and conduct ever so grievous it will be murder in him and his second.‡ But where upon a sudden quarrel two persons fight and death ensue to one of them, if it appear that it was not the result of preconceived anger or malice, the other cannot be convicted of more than manslaughter. On the other hand, if the parties fight at any time after the quarrel, so considerable, that it may be reasonably supposed that the blood was cooled, and the first burst of anger passed away, the person killing will be guilty of murder.

In 1838, Messrs. Young and Webber were tried before Mr. Justice Vaughan and Mr. Baron Alderson, on an indictment, charging them (together with two other persons not in custody, viz., F. L. Eliot and E. D. Broughton) for the wilful murder

* *Reg.* v. *Smith*, 8 C. & P. 812.

† *Reg.* v. *Holden*, 8 C. & P. 814. ‡ 1 Russell, 297.

of Charles F. Mirfin, who was killed in a duel by Mr. Eliot, at which the prisoners Young and Webber were present, aiding and abetting.

Mr. Justice Vaughan, in summing up to the jury, said,—"There is no difficulty as to the law upon this subject. Principals in the first degree are those by whom the death wound is inflicted; principals in the second degree, those who are present at the time it is given, aiding, abetting, comforting, and assisting the persons actually engaged in the contest. Mere presence alone will not be sufficient to make a party an aider and abetter; but it is essential that he should by his countenance and conduct in the proceeding, being present, aid and assist the principals. When upon a previous arrangement and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder; and the seconds also are equally guilty. The question then is did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest? There are some peculiarities in this case, and one is, that four persons, two of whom were the prisoners, went down to the ground in company with Eliot, and that neither of the prisoners was called upon to act as a second. If, however, either of them sustained the principal by his advice or presence, or, if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say

or do anything, yet, if he was present and was assisting and encouraging at the moment when the pistol was fired, he will be guilty of the offence imputed by the indictment. Questions have arisen, as to how far the second of a party killed in a duel, is liable to an indictment for the murder of the deceased. I am clearly of opinion that he is. But the real question here is, whether you are quite satisfied that the prisoners were on the ground for the purpose of giving aid and assistance when the fatal shot was fired. If near enough to give their aid and to give their countenance and assistance, that would render them liable upon the charge now made against them. As it seems to me the going down with the person who fired the shot, if they were present when it was fired, is an indication of guilt. But it is said on behalf of one of the prisoners, that he was there for the purpose of bringing about a reconciliation, and not to give his countenance to the continuance of the contest; and that he did not remain. That is a question for you. There is no evidence that either of them said or did anything; but if you are satisfied that they went down and returned with Mr. Eliot and his other friends, that leads to a strong inference that they were present when the shot was fired. It may be by possibility that Webber retired after the first shot, or, if you can suppose that after that he turned his back, intending to have nothing more to do with the matter, then it would be difficult to say that he was present, aiding, abetting, and as-

sisting. Webber says, "*I am not implicated in it;*" but it is a strong circumstance that all Eliot's party go down to the ground in company, and that they are traced back to town together." The jury returned a verdict of "*guilty*" against both prisoners. *

Where persons having authority over others, to arrest or imprison them, and using proper and lawful means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance. †

Justifiable homicide is where no blame whatever is attached to the party killing. Excusable homicide is where the party killing is not altogether free from blame. The Act 9 Geo. 4. cap. 31. sect. 10. enacts that no punishments or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony.

Where an officer in the execution of his office, either in a civil or criminal case, kills a person that assaults or resists him; or if, in attempting to take a man charged with felony, he be resisted, and, in the endeavour to take him, kills him, it would be justifiable homicide in the officer, provided he could show that there was a positive necessity on his side, that the party could not be arrested or apprehended—that the mutiny could not be suppressed —that the prisoners could not be kept in hold unless such homicide were committed; otherwise

* 8 C. & P. 652. † 1 Russell, 592.

without such absolute necessity it is not justifiable. *

In October, 1812, Lieutenant Gamage of the Griffon was tried by court-martial for having on the 20th of that month killed Serjeant Lake of the royal marines, by stabbing him with his sword. The circumstances which led to this melancholy affair are briefly these:—Mr. Gamage ordered the serjeant to walk the gangway with his musket as a punishment for some offence which he had committed; the serjeant refused, and, from the evidence produced at the court-martial, appears to have behaved himself in a very insubordinate manner. Mr. Gamage went below and put his sword on, returned to the deck and repeated his order to the serjeant, who still positively refused to obey; whereupon he (Mr. Gamage) stabbed him. There was no mutiny in the ship's company, no immediate danger of anything of the sort, and consequently it was the duty of the lieutenant to cause the serjeant to be arrested and confined until an opportunity presented itself of bringing him to a court-martial for his misconduct. Unfortunately, however, in a moment of irritation, and, perhaps, under the impression that he was doing no more than what he would be legally borne out in doing, he assumed an authority over the life of a fellow subject, which the law will only tolerate in cases of the *most pressing and absolute necessity*. Notwithstanding the high character for humanity

* 4 Black. Comm. 178. (edit. 1800).

which he received from several officers and men, the Court found him guilty of murder, and he expiated his crime by an ignominious death.

Homicide is also justifiable if committed for the prevention of any forcible or atrocious crime; for instance, the law justifies a woman killing one who attempts to ravish her. For the one uniform principle that runs through our own and all other laws seems to be this — that where a crime, in itself capital, is endeavoured to be committed by force, it is lawful to repel that force by the death of the party attempting.*

Excusable homicide is where a man doing a lawful act, without any intention of hurt, unfortunately kills another. As where a person is shooting at a mark and undesignedly kills a man; or where an officer punishing a criminal and happens to occasion his death, it is only misadventure; for the act of correction was lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quality of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. So also in self-defence upon a sudden affray homicide is excusable rather than justifiable. The right of natural defence does not imply a right of attacking; for instead of attacking one another for injuries past or impending men need only have recourse to the proper tribunals of justice. They cannot there-

* 4 Black. Comm. 180. (edit. 1800).

fore legally exercise this right of preventive defence, but in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or, at least, probable) means of escaping from his assailant.*

"There is one species of homicide *se defendendo*, where the party slain is equally innocent as he who occasions his death; and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life preferably to that of another where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon, where two persons, being shipwrecked and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned. He who thus preserves his own life at the expense of another man's, is excusable through unavoidable necessity, and the principle of self-defence; since their both remaining on the same weak plank is a mutual, though innocent, attempt upon and an endangerment of each other's life."†

"If two draw their swords upon a sudden quarrel, and one kills the other, it is only manslaughter. Sir Charles Pym with one party, and Mr. Walters with another party, dined at a tavern, and on coming out, Sir Charles P. and Mr. W. quarrelled and

* 4 Black. Comm. 181. (edit. 1800). † Ibid. 185.

drew their swords, and Mr. W. ran Sir Charles P. through the body and he died. There was no evidence of any unfair advantage taken by Mr. W. nor could the witnesses say more than that they heard them quarrelling, saw their swords drawn, and the sword through Sir Charles P.'s body; and it appeared that the parties did not know each other before. When Sir Charles P. fell, Mr. W. took him by the nape of the neck, and dashed his head upon the ground, and said, 'Damn you, you are dead.' Jenner, B., told the jury that this was only manslaughter. The jury, however, were disposed to find it murder, because of the dashing the head against the ground, &c.; but Allibone, J., repeated to them that it was manslaughter only, and they found accordingly."*

"But where two persons who have formerly fought on malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge, unless it appears by the whole circumstances of the case."†

"The crime of manslaughter does not admit of accessories before the fact, because it is supposed to be altogether unpremeditated. But all those who are present aiding and abetting the fact committed are considered principals in the second degree. There may, however, be accessories after the fact in manslaughter. If, therefore, upon an indictment against the principal and an accessory

* 1 Russell, 586. † 1 Hale, 452.

after the fact for murder, the offence of the principal be reduced to manslaughter, the accessory may be convicted as accessory to the manslaughter."*

ARTICLE 29.	
For that he, the said ——, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ——, 18—, commit the unnatural and detestable sin of buggery with (*here insert the name in full of the party upon whom, and the place where, the crime was perpetrated*).†	Death.

This is a horrible crime to contemplate, and one wherein the Court may more readily than in any other case be imposed upon by the testimony of false and malicious witnesses, creating, as it naturally does, so much prejudice against the parties accused of having committed it. Blackstone says, "It is a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished; — a crime of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out, for, if false, it deserves a punishment inferior only to that of the crime itself." It therefore behoves the Court to be extremely minute and careful in the examination of the witnesses, and guarded

* 1 Russell, 579.

† Add another charge against the parties, so as to bring them within the 2d Article of War, lest the capital charge should not be proved. (*Vide* page 174. Article 2.)

in giving their judgment. However clear against the prisoner it may appear to be, no feeling of delicacy or disgust will justify them in omitting to inquire into all the circumstances of the transaction they are called upon to investigate; the witnesses should be forced to give their evidence in plain unmistakeable terms; and the Court must always bear in mind the difference between *legal* and *moral* guilt, and that, to render the crime complete in the eye of the law, there must be proof of penetration into the body: emission need not be proved. (9 Geo. 4. c. 31. s. 18.)

Both parties who may be implicated are amenable to prosecution, and to the same punishment in case of conviction; but it is never advisable to prosecute both, except where the evidence against both is sufficient, independent of the testimony of either of them against the other. If it be committed on a boy under fourteen years of age, it is felony in the agent only, and the boy may be convicted of a breach of the 2nd Article of War, relating to uncleanness and scandalous actions.

"It is not allowable to show, on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence as that charged against him; therefore, in a prosecution for an infamous crime, an admission by the prisoner that he had committed such an offence at another time, and with another person, and that his natural inclination was towards such practices, ought not to be received in evidence.

"In cases where it is not probable that all the circumstances necessary to constitute this offence will be proved, it may be advisable only to prefer an indictment for an assault* with intent to commit an unnatural crime. And it should be observed, that the mere soliciting another to the commission of this crime has been treated as an indictable offence." †

In order to obviate the possibility of any ulterior difficulty arising on the question of the proceedings of the Court in cases of this nature, the Judge-Advocate should enter on the minutes the fact of the attention of the Court having been directed to the state of the law in reference to this crime.

ARTICLE 30.

For that he, the said———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18— (*here insert the place where the offence was committed*), commit a robbery, by (*here insert the facts, and a description of the articles stolen*), the property of ——, &c.

Death; or otherwise, as a court-martial, upon consideration of circumstances, shall find meet.

"It is not necessary the prosecutor should prove all the articles mentioned in the indictment to have been stolen: if he prove the defendant to have stolen any one of them, it is sufficient." ‡

* At courts-martial for "uncleanness." (*Vide* page 174. Article 2.)

† 1 Russell, 699.

‡ Archbold, 170.

The common law of England draws a distinction between "robbery" and "theft." *Robbery* is defined to be "the felonious and forcible taking, from the person of another, of goods or money to any value, by putting him in fear."* *Theft* is "the felonious taking and carrying away of the personal goods of another, unaccompanied with any other atrocious circumstances."†

Although the latter crime was provided for in the Act of 13 Chas. 2. c. 9., there is no mention made of it in the present Articles of War; but the practice at courts-martial has been to take cognizance of it under the 30th Article. This practice has obtained so long, that we apprehend no objection could be made to it now; but it is very doubtful whether a court-martial would be justified in awarding a capital punishment for a breach of this Article unless the offence amounted to a *robbery* in the legal acceptation of that term.

On the morning of the 28th April, 1789, the "Ambuscade" being at Messina, the ship's company were sent on shore to the lazaretto, by the direction of the officer of the Health Office, in order to their being smoked. At noon the ship's company all returned on board. At one in the afternoon the commander received advice from the keepers of the lazaretto, that, on examining the magazines after the people were smoked and gone on board, they found several pieces of gold and

* Black. Comm. 243. (edit. 1800.) † Ibid. 229.

silver brocade velvet missing (the same being part of the cargo of a merchant-vessel, and had been put on shore from her to perform quarantine), and that they supposed it must have been stolen by some of the "Ambuscade's" people. Three men were tried by court-martial for this offence, two of whom were adjudged to suffer death, and the other to receive 400 lashes. A doubt arose as to whether the offence proved against the prisoners amounted to a *robbery* within the true intent and meaning of the 30th Article of War; and whether the prisoners were triable by court-martial for the said offence, notwithstanding the same was committed out of His Majesty's dominions.

The opinion of His Majesty's Advocate, Attorney-General, Solicitor-General, and counsel for the Admiralty, to whom the questions were referred, was as follows:—

"We think the offence charged against the prisoners was robbery within the meaning of the 30th Article; and that the prisoners might be tried under the authority of the 35th Article.

"W. SCOTT,
"A. MACDONALD,
"JNO. SCOTT,
"THOS. BEVAN.
"F. C. CUST."

ARTICLE 31.

For that he, the said ———, being in actual service and full

To be cashiered, and rendered incapable of further em-

pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, knowingly sign a false muster-book of the said ship, for the period between —— and ——, in which the name of ——— appears on the ship's company's list, at number ——, as an able seaman, whereas no such person as ——— was, or has since been, part of the crew of, and belonging to the said ship.

ployment in Her Majesty's naval service.

ARTICLE 32.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, when charged as Provost-Marshal with the custody of ——, a prisoner lawfully committed to his charge, wilfully suffer the said —— to escape.

Such punishment as a court-martial shall deem him to deserve.

ARTICLE 33.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, behave in a cruel and oppressive manner to —— (*here insert the name of the party, and the particulars on which the charge is founded.*)

To be dismissed from Her Majesty's service.

Act 10 and 11 Vict. cap. 59. sec. 2.

MANSLAUGHTER.

For that he, the said ———, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ———, 18—, when on shore at Lisbon, in the dominions of Her Majesty the Queen of Portugal, unlawfully kill ——, by discharging at him a certain pistol, then and there loaded, and charged with gunpowder and one leaden bullet, with which leaden bullet the said —— did shoot the said —— in the head, giving to the said —— one mortal wound, of which mortal wound the said —— did languish until the —— day of ———, 18—, on which said —— day of ———, 18—, the said ——, on shore at Lisbon, as aforesaid, of the said mortal wound died.

Such punishment, other than death, as the degree of the offence shall be found to deserve.

Manslaughter is the unlawful killing of another without malice either express or implied, which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act.

NOTE. — For further information regarding this crime, see remarks appended to the 28th Article, page 189.

AN

ABSTRACT

OF THE MORE

IMPORTANT COURTS-MARTIAL

FROM 1829 TO 1848.

NOTE.

The object of inserting this list being to show the punishments that have usually been awarded for certain offences, it has not been considered necessary to notice those trials which ended in an acquittal.

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1829. Jan. 2.	W. Maxwell	Boatswain	Tweed -	Sodomy - - - -
Jan. 6.	J. Luckombe	Purser	Barham -	Disobedience of orders, and contempt to his superior officer.
Jan. 6.	J. Farmouth	Seaman	Druid - -	Making use of mutinous expressions towards Lieut. J. Shepherd of that ship, on the quarter deck, and striking Sergeant Barrett, his superior officer.
Jan. 7.	W. Molyneux	Lieutenant	Magnificent -	Neglect of duty - - -
Jan. 7.	G. Cole	Seaman	Druid - -	Disobedience of orders and mutinous conduct.
Jan. 8.	T. Lapham -	Marine	Magnificent -	Disobedience of orders and contempt to his superior officer.
Jan. 8.	G. W. Lewis -	Acting lieutenant.	Mersey, late mate of Magnificent.	For a breach of the 23d Article of War, and unofficerlike conduct.
Jan. 9.	D. Gray -	Assistant surgeon.	Espiegle -	Drunkenness - - - -
Jan. 9.	A. De Mayne, officers and crew.	Master, commanding.	Kangaroo, surveying vessel.	For the loss of that ship on the Hogsties.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Proved - - - -	To suffer death.	
Proved - - - -	In consideration of his long services, and of his character from documents presented to the Court, only severely reprimanded and admonished to be more circumspect in his conduct in future.	
Fully proved - - -	To suffer death - - - -	Recommended to mercy. Transported for life.
Fully proved - - -	In consideration of a letter addressed to the Court from the commander-in-chief by which it appears that he has lost his promotion; only dismissed his ship; and his promotion to be stopped for twelve months.	
Proved - - - -	To receive 100 lashes, and to be mulct of all his pay. And it appearing to the Court, that William Cross, gun-room steward of the "Druid," who was produced as a witness and sworn and examined on the said trial, did in the course of his examination, prevaricate in his evidence, the Court doth therefore order him to be imprisoned *on board the* "*Magnificent*," for the term of two months.	Vide, page 151.
Fully proved - - -	To receive 100 lashes, to be mulct of all pay due to him, and to forfeit and lose all claims of every description which he may be entitled to by reason of his previous servitude.	
Proved - - - -	Dismissed his ship; and if confirmed to the rank of lieutenant, to be placed and kept at the bottom of the list of lieutenants for three years; or if he should not be confirmed to that rank, then to be dismissed the service.	This sentence is invalid on the ground of uncertainty.
Proved - - - -	In consideration of circumstances, only dismissed his ship, and to be placed at the bottom of the list of assistant surgeons, there to remain for three years.	
That Mr. De Mayne is guilty of the most palpable neglect in not shaping a course and regulating the distance run, so as to avoid the danger on which the "Kangaroo" was wrecked; that after she struck the ground the most effectual measures were not taken to get the ship off: the time being consumed in fruitless endeavours to back the ship off, by means of her sails, when it should have been employed in hoisting out the pinnace, and laying out a stream anchor; and by entrusting the charge of a watch to a gunner's mate, with sufficient superior officers on board for that duty; as well as neglecting to keep the lead going. And that Mr. R. Campbell, acting second master, and Mr. J. Fremely, mate and assistant surveyor, are highly censurable for their conduct on the occasion.	The master to be dismissed the service, and never again to be entrusted with the charge of one of his Majesty's ships or vessels. Mr. De Mayne recommended to the favourable consideration of the Lords Commissioners of the Admiralty for placing him on the half-pay list. Dismissed the service, the rest of the officers and ships' company acquitted.	This sentence, with the recommendation appended to it as far as regards Mr. De Mayne, appears to be inconsistent.

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1829. Jan. 9.	J. Smith R. Jones	Captain, Forecastle. Seaman	Barham	Desertion
July 17.	J. Orten	Marine	Barham	Drunkenness
July 17.	J Bennett	Carpenter	Mersey	Absenting himself without leave
Oct. 15.	J. Bathie J. Lada W. Scott	Seaman Seaman Seaman	Cruizer	Desertion
1830. Jan. 18.	J. Miller	Smuggler	Espoigle	Disobedience of orders
Feb. 4.	A. M'Gregan	Carpenter	Erebus	Drunkenness
Mar. 13.	J. Luckombe	Purser	Barham	Insolence to Mr. G. Cole, master of the "Barham," his superior officer.
Mar. 15.	G. H. Cole	Master	Barham	Unofficerlike conduct
Mar. 19.	R. Russell R. Hodges	Commander Master	Wolf	Running the "Wolf" on shore at the back of the Isle of Wight.
Mar. 20.	J. Luckombe	Purser	Barham	Unofficerlike conduct
April 22.	J. Cater	Acting Master	Hecla	Disgraceful conduct and uncleanness.
April 26.	D. Gray	Acting Surgeon	Hecla	Unofficerlike conduct
May 3.	G. Davies	Lieutenant	Sparrowhawk	Insolence and contempt to his commander.
May 6.	T. Gill	Commander	Sparrowhawk	Unofficerlike conduct
May 7.	J. Drinen	Seaman	Blossom	Striking his superior officer when in the execution of his duty.
Aug. 19.	T. Williams	Carpenter	Favorite	Drunkenness
Oct. 8.	H. M'Vea	Marine	Winchester	Theft, and an attempt to desert
Oct. 15.	J. Polglaze	Boatswain	North Star	Drunkenness
Oct. 15.	W. Mitchell	Seaman	Champion	Attempting to desert
1831. Jan. 3.	J. Thomson	Purser	Lightning	Endeavouring to procure the insertion in vouchers of 968 pounds of bread, with the intention to receive the value thereof in money. Demanding or endeavouring to obtain a certain sum of money from Mr. T. Russell, as a share of profit upon the sale of the said bread and other provisions. Receiving on board certain articles of provisions, on his private account, and issuing them to the crew; and neglect of duty.

Finding of the sentence.	Punishment awarded.	Remarks, &c.
Proved	J. Smith to be disrated to able seaman, to lose all the pay due to him, to forfeit and lose all his time for pension, and to receive 80 lashes. R. Jones to lose all pay due to him, to forfeit and lose all his time for pension, and to receive 100 lashes.	
Proved	To receive 100 lashes, and to forfeit all pay due to him, as well as the whole of the time he has served in the marines.	
Fully proved	Dismissed from his situation as carpenter of the "Mersey," and to serve before the *mast* in any of his Majesty's ships or vessels the commander-in-chief shall direct.	
Proved	To receive 150 lashes each.	
Proved	To be admonished.	
Proved	Dismissed from the service.	
Proved	To be severely reprimanded.	
Proved	Admonished to be more circumspect in future.	
Proved	Commander Russell to be dismissed from the service, and Mr. R. Hodges, master, to be severely reprimanded, and placed at the *bottom* of the list of masters.	
Proved	Dismissed the *ship*.	
In part proved	Admonished to be more careful in his conduct in future.	
Proved	Dismissed from the service.	
Proved in part	Reprimanded.	
In part proved	Admonished to be more guarded in his conduct in future.	
Proved	To be hanged	Punishment of death remitted. Transported for life.
Proved	Dismissed the ship.	
Charge of theft, not proved. Charge of an attempt to desert. Proved.	To receive 100 lashes.	
Proved	Reprimanded, and admonished to be more careful in future.	
Proved	To receive 50 lashes.	
First and second charges, not proved. Third charge, in part proved. Fourth charge, proved.	Dismissed the *ship*.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1831.				
Jan. 8.	Robert Deans W. Worsfold	Commander Lieutenant	Childers	Oppressive conduct towards a midshipman.
Jan. 25.	T. Bell	Carpenter	Winchester	Drunkenness
Jan. 26.	J. Horsley	Marine	Nimble	For a breach of the 2nd, 19th, 22nd, 23rd, and 27th Articles of War.
Jan. 26.	J. Brady	Marine	Nimble	For a culpable breach of the 2nd, 19th, and 23rd Articles of War.
Jan. 27.	J. Anderson	Quarter Master.	Hyacinth	Mutinous conduct, insolence, disobedience of orders, and insisting that the corporal of marines had been bribed to maltreat him by Lieut. Dawson, and other mutinous expressions, tending to create disturbance in the ship.
Jan. 29.	W. Smith	Seaman	Mersey	Repeated drunkenness; riotous and mutinous conduct.
Mar. 2.	R. W. Millroy	Master	Success	Disorderly conduct
Mar. 3.	James Sparshott	Purser	Crocodile	For a breach of 19th and 22nd Articles of War.
Mar. 11.	P. Kent	Seaman	Victor	Desertion
Mar. 15.	S. Burgess W. Gowdy The officers and crew.	Captain Master	Thetis	For the loss of that ship on Cape Frio
July 13.	D. Thomas	Marine	Ganges	Striking his superior officer on the quarter deck.
Aug. 26.	F. G. Bond	Lieutenant	Ætna	Neglect of duty
Sept. 23.	H. G. Backhouse	Midshipman	Ætna	Repeated acts of insubordination. Neglect of duty and disrespectful and contemptuous and insolent conduct towards Commander E. Belcher. Quitting the ship in defiance of the first lieutenant's refusal of leave of absence, and for having absented himself from his duty, when it was his watch on deck.
Dec. 26.	T. Lapham	Marine	Ætna	Mutinous conduct, and striking Tho. Seabridge, the serjeant of marines.
1832.				
Feb. 20.	F. Thomas	Seaman	Firefly	Mutinous and insulting language towards Lieut. J. J. M'Donnell, commanding the "Firefly"
Mar. 20.	J. Sparshott	Purser	Crocodile	For a breach of the 19th and 22nd Articles of War:—First, for disobedience of orders in two instances; 2ndly, for behaving in a disrespectful manner to his commanding officer.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Proved	Admonished to be more circumspect in their conduct in future.	See page 142.
Proved	To forfeit all claim to pension arising from his two last years' of sea service; and, further, to be dismissed his ship, to serve in a ship of the fifth rate.	
Proved	To receive 100 lashes, and lose three years' time.	
Proved	To be mulct of all pay and prize money due to him; to receive 150 lashes; and then to be discharged, with disgrace, from the service.	
First charge, in part proved: and that the words so set forth in the second charge, were uttered by the prisoner; but not with an intent of creating a disturbance in the ship.	To receive 48 lashes; to be disrated from his present situation; and to be discharged from the "Hyacinth" into any other vessel of war the commander-in-chief may judge fit.	
Proved	It appearing from the testimony produced, that his misconduct has arisen from temporary insanity, caused by a severe wound in the head, the Court doth not think fit to adjudge any punishment to be inflicted on the prisoner for the offences which he has committed; but the Court recommends that he may be invalided from the service.	
Fully proved	Dismissed the service.	
In part proved	Reprimanded and admonished to be more careful in future.	
Proved	To receive 50 lashes; to be mulct of all pay now due to him; and to be discharged, with disgrace, from the service.	
That blame is imputable to Capt. Burgess, and to Mr. W. Gowdy, the master, for their conduct on the occasion.	Captain S. Burgess to lose one year's rank; and Mr. W. Gowdy only two years' rank in His Majesty's naval service. The remaining officers and crew acquitted.	
Fully proved; and that he fell under the first part of the 22nd Article of War.	To suffer death	Recommended strongly as a proper object for mercy.
In part proved	Admonished to be more careful in future.	
Charge of insubordination in quitting the ship in defiance of the first lieutenant's refusal of leave of absence, has been proved; but that the other charges have not been proved.	To be discharged from the "Ætna;" and to be reprimanded and admonished to be more circumspect in his conduct in future.	
Proved	To suffer death.	
Proved	To receive 50 lashes; to be mulct of all pay due to him; and discharged from the service.	
Proved	Dismissed his ship; and to be placed at the bottom of the list of pursers of the year 1809.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1832. Mar. 31.	T. Woore -	Acting Lieutenant	Crocodile -	For having written and sent an improper letter to his Captain, J. W. Montagu.
April 2.	J. Price - J. Booth -	Lieutenant Acting Surgeon	Wolf	Unofficerlike conduct - - - -
May 12.	B. Boyd -	Clerk	Sparrowhawk	For insubordination; and for having behaved in a highly discreditable and guilty manner by making several attempts to defraud the midshipman's mess on board the "Sparrowhawk," while he acted as caterer, of money deposited in his care for mess purposes.
Oct. 11.	J. Deane -	Carpenter	Imogene -	Drunkenness, and fighting with the assistant surgeon of the "Imogene."
Dec. 24.	J. Robinson -	Boatswain	Pallas -	Drunkenness - - - - -
Dec. 26.	G. L. Campbell	Lieutenant	Winchester -	For being in a state of intoxication on the 3rd day of November, 1832, when in charge of H. M. dockyard lighter "Medway," proceeding under the command of Commander G. Daniell of H. M. S. "Dispatch," for which the said Commander G. Daniell deemed it expedient for the safety of the said lighter to supersede him.
Dec. 27.	M. Thomas - R. M. Gransoll - E. M. Noble -	Lieutenant 2nd Master Midshipman	Medway, dockyard lighter.	For the loss of the "Medway," near Plumb Point, Jamaica.
1833. Feb. 1.	J. D. C. Lamont	Lieutenant R. M.	Briton -	Insulting the *senior* lieutenant, and threatening to demand satisfaction of him, when the ship should be paid off.
Aug. 10.	C. Baker -	Gunner	Sheldrake -	Stealing rum from the spirit-room -
Dec. 9.	R. B. Crawford	Lieutenant Commanding	Charybdis -	Extravagant and improper expenditure of stores.
1834. April 28.	C. Bagot -	Lieutenant Commanding	Pickle -	To inquire into the circumstances attending the death of J. Grainge, private marine, who was killed by the explosion of a carronade fired by the said lieutenant; and for having improperly punished P. Phillips, a seaman.
Aug. 20.	A. Lawrence -	Surgeon	Buzzard -	Drunkenness - - - - -

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Proved. That the letter which he wrote and sent to Captain J. W. Montagu, was an offence against the discipline of the service, which has a most injurious tendency, and is highly reprehensible.	To be severely reprimanded, and strongly admonished to be more circumspect in his future conduct to his superiors.	
Proved - - - -	Dismissed the service.	
First charge proved. Second charge not proved.	Dismissed the service.	
Proved - - - -	Dismissed his ship, and to lose two years' time.	
Fully proved - - -	Dismissed the service; but from the good character he held, when serving as a petty officer, the Court recommended *him* to the consideration of the Lords Commissioners of the Admiralty.	
Fully proved - - -	Dismissed the service.	
That Lieutenant M. Thomas is guilty of a breach of a part of the 26th Article of War.	Severely reprimanded, and admonished to be more cautious in future.	
That Mr. R. M. Gransell, second master, is culpable in his conduct on the occasion of the loss of the "Medway."	Admonished to be more zealous in future.	
And that Mr. E. M. Noble, midshipman, is culpable in his conduct on the occasion of the loss of the "Medway."	Reprimanded and admonished to be more careful and attentive on every occasion.	
Proved - - - -	Dismissed the service.	
Proved - - - -	Dismissed the service.	
In part proved - - -	Dismissed the service: recommended to the favourable consideration of the Lords Commissioners of the Admiralty.	
The death of J. Grainge, caused by gross negligence on the part of Lieut. C. Bagot. And that there was no sufficient reason shown for having departed from the regulations of the service on the occasion of punishing P. Phillips.	Dismissed from the service.	
Proved - - - -	Dismissed his ship; and placed at the bottom of the list of surgeons, upon which list he is never to rise.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1835.				
April 13.	W. Bunce	Boatswain	Tyne	Attempting to embezzle stores
July 21.	G. C. Stovin	Lieutenant	Algerine	Repeated acts of drunkenness, and unofficerlike conduct.
Aug. 10.	C. Cardew M. Heath	Mate Acting Master	Algerine	For mutinous conduct on board the said brig in forcibly placing and confining the lieutenant, his superior officer and commander, under arrest, and unlawfully depriving him of the command of the said brig, and the said M. Heath for having connived at, and aided and abetted the said C. Cardew, in the commission of the said crime.
Sept. 21.	T. Hawkes	Marine	Caledonia	Drunkenness and insubordination
Dec. 29.	J. Pascoe T. Barnett W. Hawkes J. Hilborn C. Webber	Seaman Marine Marine Marine Marine	Caledonia	For a breach of the 19th Article of War.
1836.				
April 15.	A. Lyons	Gunner	Delight	Drunkenness
June 28.	G. Cook J. Hayes	Marine Marine	Caledonia	Disobedience of orders, contempt, and drunkenness.
July 7.	G. Jenkins	Corporal of Marines.	Malabar	For having stabbed the master's assistant with a bayonet.
Oct. 19.	T. J. White	2nd Lieutenant, R. M.	Vanguard	Disobedience of orders, neglect of duty, and contempt.
Nov. 4.	C. Hine J. Kelby W. Witts	Marine Marine Marine	Galatea	Stealing wine from the captain's cabin, and deserting.
1837.				
Jan. 3.	J. Shaw	Assistant Surgeon	Adelaide	Drunkenness
Jan. 27.	T. Sweeney	Marine	Rodney	For having purposely and maliciously pushed Corporal J. Allen into the waist on the main deck, which caused his death.
June 30.	Sir T. Fellowes, Kt. C. B.	Captain	Pembroke	For not following the orders of Vice-Admiral Sir W. H. Gage, and for getting the said ship on shore.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Fully proved - - -	Dismissed his ship.	
In part proved - - -	In consequence of the former active and intrepid services rendered by the said Lieut. G. C. Stovin, and of his general good character, prior to his joining the "Algerine," only to be placed at the bottom of the list of lieutenants, not to be raised therefrom; and never to be employed in active service.	
The Court was of opinion that the charge against the said C. Cardew had been proved.	In consequence of the very peculiar circumstances in which he (Mr. C.) was placed, at the time of committing the offence, and, also, of the long period during which he had been under arrest, and, likewise, in consideration of his testimonials of previous good character and conduct, the Court did only adjudge him to be dismissed from the service; and to be imprisoned in the Marshalsea, for the term of three calendar months.	
The Court, also, was of opinion, that the charge against the said M. Heath had been proved.	In consideration of his having acted under feelings which had been outraged by a foul report against him; for which report, however, the Court did not consider there was the slightest foundation: And, also, in consideration of the long period during which he had been under arrest, as well as of his testimonials of former good character and conduct, the Court did only adjudge him to be dismissed from the service; and to be imprisoned in the Marshalsea, for the term of three calendar months.	
Proved - - - -	To receive 100 lashes; and to be discharged from the service, with disgrace.	
Charge not proved against T. Barnett.	Acquitted.	
Charge proved against J. Pascoe, W. Hawkes, J. Hilborn, and Charles Webber, and guilty of a breach of part of the 19th Article of War.	J. Pascoe to receive 60 lashes. W. Hawkes and J. Hilborn to receive 100 lashes each; and to be discharged, with disgrace, from the service: and C. Webber to receive 80 lashes.	
In part proved - - -	Admonished.	
Proved - - - -	To receive 50 lashes each; to be discharged with disgrace; and to be imprisoned 18 months.	
Proved - - - -	To suffer death - - - -	Transported.
Proved - - - -	Severely reprimanded; and placed at the bottom of the list of second lieutenants.	
In part proved - - -	C. Hine to receive 50 lashes; to be imprisoned for six months; and to lose all his time in the marines. J. Kelby to receive 50 lashes, and to lose three years' time: and W. Witts to receive 24 lashes.	
Proved - - - -	Dismissed from the service; and rendered incapable of ever serving again as an officer.	
Proved - - - -	To suffer death.	
Proved - - - -	Admonished.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1837. Sept. 26.	A. S. Knight -	Master	Delight -	Drunkenness, and tearing out a leaf from the ship's log.
1838. Mar. 13.	J. Scott -	Boatswain	Rainbow -	Refusing to do duty - - -
April 2.	R. Morgan -	Lieutenant	Pembroke -	Indecency - - - -
May 8.	H. G. Ayscough	Lieutenant	Barham -	Indecency - - - -
1839. Feb. 22.	T. Fisher	Lieutenant	Tribune -	Drunkenness and leaving the deck during his watch.
March 11.	T. Stacey	Marine	Pilot -	Striking the serjeant - - -
March 25	G. Tarm J. Lodge	Seaman Seaman	Castor -	Mutinous and contemptuous behaviour
March 28.	J. P. Davey	Lieutenant	Castor -	Drunkenness - - - -
May 7.	J. Williams	Boatswain, 3rd class.	Ocean -	Drunkenness - - - -
May 18.	R. F. King	Lieutenant	Lily -	Neglect of duty; disobedience of orders; making observations on the conduct of his commander tending to bring him into contempt and disrespect; and several other charges of the same tenor, in all ten in number.
May 17.	C. H. Fuller	Surgeon -	Lily -	Disrespect, and for writing a letter to the Commander-in-Chief at the Cape of Good Hope, couched in very improper language in respect to his commanding officer.
Sept. 9.	W. B. T. Rider	Lieutenant, R. M.	Madagascar -	Unofficer-like conduct; contempt to his superior officer; disobedience of orders; and for a breach of so much of the 2nd Article of War as relates to profane oaths — cursings, execrations, &c.
Sept. 10.	W. Penny -	Gunner.	Lily -	Disobedience of orders, and overstaying his leave.
Nov. 4.	F. G. Leigh -	Mate	Castor -	Neglect of duty - - -
Nov. 26.	W. Taylor -	Gunner	Imogene -	Stealing liquor from the midshipman's berth.
Dec. 2.	J. Brown -	Seaman	Powerful -	Mutinous expressions and striking the master-at-arms.
1840. Feb. 14.	J. Stirling -	2d Engineer	Hecla - -	Striking the 3d engineer, and drunkenness.
Feb. 14.	J. Hooper -	Carpenter	Racer - -	Unbecoming and mutinous language, stating that a false log was kept in the "Racer."
Feb. 14.	T. Smith -	Boatswain	Racer - -	Unbecoming and mutinous language, stating that a false log was kept in the "Racer."

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
In part proved - - -	Dismissed his ship.	
Fully proved - - -	Dismissed the service; and to be imprisoned for twelve months in the Marshalsea.	
Proved - - - -	Dismissed from the service.	
In part proved - - -	Placed at the bottom of the list of lieutenants	
Proved - - - -	Dismissed his ship, and to be placed as the junior lieutenant of the year 1837.	
Proved - - - -	To suffer death - - - - -	Recommended to mercy.
Proved - - - -	To receive 100 lashes each round the fleet or alongside H. M. S. "Castor;" G. Tarm to be imprisoned one year, and J. Lodge six months, in the Marshalsea.	
Proved - - - -	To be placed at the bottom of the list of lieutenants, there to remain.	
Proved by the prisoner's own confession in open court.	Severely reprimanded, and to be retained on the lowest class of rating for the period of three years.	
Partly proved - - -	Admonished to be more careful in future.	
First charge proved in part; second charge not proved.	Severely reprimanded.	
In part proved - - -	In consideration of his youth and inexperience, only to be severely reprimanded, and to be placed at the bottom of the list of second lieutenants.	
Proved - - - -	In consideration of his previous good character, only to be dismissed his ship, and to be mulcted of three months' pay.	
Proved - - - -	Severely reprimanded, and to serve two years as a mate in actual service afloat, before he shall be capable of being promoted.	
Proved - - - -	Dismissed from the service	
Proved - - - -	To suffer death - - - - -	Recommended to mercy.
Most fully proved - - -	Dismissed the service, mulct of all pay due to him for his service in the Royal Navy, and to be imprisoned in the Marshalsea twelve calendar months.	
Proved - - - -	Severely reprimanded, dismissed his ship, to lose two years' standing on the list of carpenters, and to be disposed of as the Commander-in-chief may direct.	
Proved - - - -	Severely reprimanded, and to lose eight months' time on the list of boatswains.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1840. March 21.	H. H. N. Mottley	Mate	Nautilus	Indecent conduct, and attempt to commit sodomy.
March 21.	F. F. M. Strong	Master	Skylark	Neglect of duty, &c.
June 22.	E. Roberts	Gunner	Tyne	Disobedience of orders
Sept. 12.	W. Doyle	Seaman	Volage	Shooting a Chinese on board a junk, and thereby causing his death.
Sept. 23.	J. Collins	Seaman	Cleopatra	Striking a lieutenant of that ship, and killing a serjeant of marines.
Oct. 9.	T. Barry	Boatswain	Larne	Drunkenness, and endangering the safety of H. M. S. "Larne."
Oct. 12.	T. M. Rodney	Lieutenant	Conway	Unofficerlike conduct, and unbecoming language at the mess table.
Oct. 27.	J. Henty	Carpenter	Camperdown	In allowing combustibles to be placed in different parts of the ship to the imminent danger of the said ship; disobedience of orders, and making a false report.
Oct. 30.	A. Smith	Surgeon	Hecate	Drunkenness
Nov. 13.	J. Williams	Boatswain	Ocean	Drunkenness; disobedience of orders; quarrelling.
Dec. 18.	J. Julian	Purser	Sulphur	Remaining on shore contrary to orders; refusing to do duty; drunkenness and disorderly conduct.
1841. Jan. 9.	G. Hobbs	Gunner	Pigeon	Drunkenness; behaving with insolence and contempt to his superior officer, Mr. D. Brally, Acting Master of the said brig, and for having repeatedly struck him whilst in the execution of his duty.
Feb. 19.	R. B. James, the officers and crew.	Lieutenant	Spey	For the loss of that brig, on her passage between Crooked Island (or Key) and Bonavista Key.
March 4.	S. O. Wooldridge	Lieutenant	Crocodile	Insubordinate, contemptuous, and disrespectful conduct towards his superior officer, Commander W. W. P. Johnson, Acting Captain H. M. S. "Crocodile."

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Indecent conduct proved; attempt &c., not proved.	Dismissed the service, and rendered incapable of ever serving again.	
In part proved - - -	Admonished to be more circumspect in future.	
In part proved - - -	Severely reprimanded.	
Does not fall within the 28th Article of War; but guilty of having unnecessarily levelled his musket at a Chinese and shot him.	To be imprisoned two years, mulct of all pay, and discharged, with disgrace, from the service.	
Proved - - - -	To suffer death.	
Proved - - - -	In consideration of his previous high character, only to be dismissed from his office of boatswain, and to serve as a petty officer in the navy for three years.	
Proved - - - -	Severely reprimanded, and dismissed his ship.	
First charge not proved; second charge not proved; third charge fully proved.	Severely reprimanded.	
Proved - - - -	In consideration of his previous very high character, only to be severely reprimanded, dismissed his ship, and placed at the bottom of the list of surgeons.	
Fully proved - - -	Dismissed the service, and rendered incapable of ever serving again as a warrant-officer.	
All proved except drunkenness	Dismissed the service, and rendered incapable of ever serving again.	
Proved - - - -	To suffer death - - - -	Recommended to mercy. Transported for life.
That the loss of H. M. packet-brig "Spey" has been occasioned by an attempt having been made to effect a passage between Racoon Key and Bonavista Key, instead of going through the old Bahama Channel, whereby the ship struck on a coral rock; and the Court is further of opinion that there was nothing to justify such an attempt, and that great blame is therefore imputable to the said Lieutenant, R. B. James, and to Mr. W. Barrett, Master, for their conduct upon that occasion.	Lieutenant R. B. James severely reprimanded, and put at the bottom of the list of lieutenants. Mr. W. Barrett also severely reprimanded and placed at the bottom of the list of masters, and the other officers and ship's company acquitted.	
Fully proved - - -	In consequence of the very high testimonials produced by him for gallantry and good conduct whilst in H. M. ships "Thalia" and "Buzzard," only severely reprimanded.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1841. March 5.	S. Brown	Surgeon	Victor	Drunkenness
Mar. 11.	J. Ward	Boatswain	Ganges	Drunkenness
June 29.	J. Jones	Seaman	Druid	For striking the surgeon of H. M. S. "Druid."
Oct. 22.	R. George	Marine	Indus	For having committed a breach of the 22nd Article of War.
Nov. 5.	W. Richardson	Chief Engineer.	Phœnix	Going on shore without leave; disobedience of orders; contemptuous and insolent conduct.
Nov. 25.	E. W. Elton	Midshipman	Cambridge	Disrespectful conduct to Captain J. W. Williams, and presuming to quarrel with him, his superior officer.
Nov. 30.	J. Warder	Boy	Savage	For having made a false and scandalous report amongst the crew of the said brig that Lieutenant Bowker had taken improper liberties with him.
Dec. 6.	W. Ansfield	Marine	Cambridge	Disobedience of orders, making use of threatening and mutinous language.
1842. Jan. 18.	S. Dawkins	Marine	Blenheim	Stabbing to death a young Chinese soldier, who was severely wounded in the leg, at the capture of a fort on the island of Golongsoo, and for intoxication.
Jan. 19.	E. Owen	Gunner	Algerine	Going on board a Chinese trading-vessel or boat, and plundering her.
Feb. 18.	J. Goss	Second master.	Impregnable	Striking with violence E. Purns, quarter-master of the said ship, whereby the death of the said E. Purns ensued.
March 21.	W. West	Carpenter's mate.	Pickle	Deserting and taking away the cutter and four of the pistols belonging to the armament of the said schooner.
	J. Smith	Seaman		
	B. Cork	Seaman		
	C. Crane	Seaman		
	J. Adams	Boy		
Mar. 24.	J. Bingham	Marine	Pickle	Leaving his post while in charge of prisoners.
Mar. 30.	W. Avery	Marine	-	For behaving in a mutinous manner to his commanding-officer when on duty at the residence of the British Consul at Carthagena.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Fully proved	Dismissed his ship, and placed at the bottom of the list of surgeons, there to remain until the Lords Commissioners of the Admiralty may be pleased to permit his advancement on that list.	
Proved	Dismissed his ship and reduced one class lower on the list of boatswains in H. M. service.	
Proved	To receive 100 lashes, to be mulct of all pay and prize-money due to him, and to be discharged from H. M. service.	
Fully proved	To suffer death.	
First charged proved, and the remaining charges proved in part.	Reduced to a second class engineer, severely reprimanded, and to be placed in such one of H. M. steam-vessels as the Commander-in-Chief shall direct.	
Proved	Dismissed the service, and to be imprisoned for the space of six calendar months in such of Her Majesty's gaols as the Lords Commissioners of the Admiralty may be pleased to direct, commencing from the date of the prisoner's arrival in England.	
Proved	Dismissed the service, and to be imprisoned for the space of six calendar months in such of her Majesty's gaols as the Lords Commissioners of the Admiralty may be pleased to direct, commencing from the date of the prisoner's arrival in England.	
Fully proved	To receive 48 lashes.	
First charged not proved. Second charge proved.	Admonished.	
Proved	Dismissed his ship, and to serve before the mast. The Court, in consideration of the high character given of him by the president and all the officers of the "Algerine," recommended him to the favourable consideration of the Commander-in-Chief.	
Partly proved	Dismissed the service.	
First charge proved against W. West and J. Smith, with the exception of taking with them the cutter.	W. West and J. Smith to receive 100 lashes each, and to be imprisoned for the space of one year in one of her Majesty's prisons.	
Second charge proved against W. West, J. Smith, B. Cork, C. Crane, and J. Adams, with the exception of taking away with them the four pistols.	B. Cook, R. Crane, and J. Adams to receive 100 lashes each.	
In part proved	To receive 60 lashes.	
Proved	To receive 50 lashes.	

Date of Trial	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1842. Mar. 31.	J. Drysdale	2d Master	Magnificent	Drunkenness
Mar. 31.	W. Cumming	Seaman	Cambridge	Murder
April 4.	R. Ellis	Lieutenant	Electra	Drunkenness; being asleep in his cabin during the time it was his watch on deck.
June 9.	T. Williams	Boatswain	Vernon	Drunkenness, and unofficerlike conduct.
June 10.	S. Sheep B. Bass	Seaman Seaman	Calcutta	Gross indecency
June 14.	J. Bradford	Seaman	Vesuvius	Mutinous conduct, and threatening the life of Lieutenant Burnett.
July 8.	J. Bascombe	Master	Larne	General neglect of duty
July 14.	J. M'Donough	3d Engineer	Medea	Absenting himself after being refused leave.
Aug. 25.	H. Chapman W. W. Thunder	2d Engineer 3d Engineer	Geyser	Neglect of duty; going on shore without leave; and unofficerlike conduct.
Sept. 3.	S. Cowker E. Keys J. Metham J. Russell N. Division J. E. Ball	Seaman Seaman Seaman Seaman Boy, 1st class. Boy, 2d class.	Curlew	Signing a mutinous document called a "round robin," and for deserting from the cutter of the said ship while on duty at Rio de Janeiro.
Sept. 19.	T. Biggs	Marine	Illustrious	Theft
Oct. 10.	W. Wallace R. Bailey	Seaman Boy	Emerald	Indecency
Oct. 10.	W. Babb	Carpenter	Spartan	Absenting himself without leave, and drunkenness.
Oct. 11.	E. H. Alston	Lieutenant	Cambridge	Disrespect to his superior officer, and beating with a stick Mr. T. Fitzgerald, volunteer, first class; unofficerlike conduct.
Oct. 13.	J. Williams	Boatswain	Inconstant	Drunkenness
Oct. 26.	J. Elliott	Lieutenant	North Star	Unofficerlike conduct; contemptuous and disrespectful behaviour; disobedience of orders.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Proved	Dismissed the service.	
Proved	To suffer death.	
Fully proved	Dismissed his ship, and placed at the bottom of the list of lieutenants, whence to rise after the expiration of three years.	
Proved	Dismissed his ship, lose seven years' time as a warrant officer, reduced to the third class, and there to remain for the term of five years.	
Fully proved	To receive 48 lashes each, drummed round the squadron, imprisoned for twelve calendar months, and discharged from the service with disgrace.	
Proved	To suffer death	Recommended to mercy. Punishment of death remitted. Transported for 7 years.
Proved	Dismissed the service.	
Fully proved	Dismissed the service with disgrace, and imprisoned for the space of three calendar months in one of *Her Majesty's* gaols.	
First charged not proved: Second charge proved. Third charge not proved against H. Chapman.	Mr. H. Chapman severely reprimanded, and to lose one year's time as an engineer.	
First charge not proved. Second and third charges proved against W. W. Thunder.	Mr. W. W. Thunder dismissed the service with disgrace, and to be imprisoned for the space of three calendar months in one of Her Majesty's gaols.	
First charge not proved.	J. Cowker and E. Keys to receive 48 lashes each.	
Second charge in part proved against the prisoners.	J. Metham to receive 72 lashes, *two weeks' solitary confinement*, and discharged from the service with disgrace.	Vide page 151.
	J. Russell to receive 48 lashes, *and one week's solitary confinement*.	Vide page 151.
	N. Division and J. E. Ball to receive 36 lashes each.	
Proved	To receive 50 lashes, to be imprisoned for six months, and discharged from the service with disgrace.	
Proved	W. Wallace to receive 100 lashes and discharged from the service with disgrace. R. Bailey to receive 50 lashes and discharged from the service with disgrace.	
Proved	Dismissed the ship, and reduced to a third-class warrant officer.	
Proved	Dismissed from the service.	
Proved	Dismissed his ship, reduced to the lowest class of boatswains, and not to be advanced therefrom for a period of six years.	
Proved	Dismissed from the service.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1843. Jan. 3.	J. W. Saunders	Acting Master.	Geyser	Getting the said ship on shore, and threatening to give up charge as master.
Jan. 9.	J. Balls	Boatswain	Thunderbolt	Neglect of duty
Jan. 9.	J. Letton	Gunner	Frolic	Absenting himself without leave
Jan. 13.	W. Parkes	1st Engineer	Driver	Drunkenness
Jan. 13.	The Honourable C. G. S. B. Elliot.	Captain	Spartan	Flogging a midshipman
Feb. 20.	E. Martin	Carpenter	Volage	Drunkenness and contempt
Feb. 27.	F. Morris	Boatswain	Pelican	Drunkenness
Feb. 28.	E. L. Hoblyn	Lieutenant	Wolverene	Repented drunkenness and unofficer-like conduct.
Feb. 28.	Sir C. Sullivan, Bart., the officers and crew.	Captain	Formidable	Running that ship aground on the coast of Spain.
Mar. 2.	R. Moultan	Boatswain	Illustrious	Absenting himself without leave
Mar. 4.	J. Brally	2nd Master	Pickle	Desertion
Mar. 17.	G. Oldmixon, the officers and crew.	Lieutenant commanding.	M gæra	For the loss of that ship at Jamaica
Mar. 20.	J. Thorne	Engineer	Avon	Drunkenness, mutinous conduct, and disobedience of orders.
Aug. 17.	R. H. Jenkins	Lieutenant	Ferret	Drunkenness
Aug. 21.	E. Lloyd	Seaman	Warspite	Disobedience of orders, striking and escaping from the ship's corporal.
Sept. 12.	R. M'Intyre	1st Engineer	Spitfire	Drunkenness, contempt, &c.
Sept. 30.	R. Taylor	Boatswain's mate.	Volage	Drunkenness and mutinous conduct
Oct. 6.	J. Mitchell	Seaman	Belvidera	Indecency
Oct. 13.	W. Pound	Boatswain	Rose	Striking the gunner
Oct. 20.	F. Morris	Lieutenant	Tweed	Disrespectful expressions to the senior lieutenant.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Guilty of getting the ship on shore. Second charge proved, but the Court found that the prisoner made the statement to his commander in a respectful manner; they therefore acquitted him of the second charge.	Reprimanded, and admonished to be more careful in future.	
In part proved - - -	Dismissed his ship and severely reprimanded.	
Fully proved - - -	Dismissed the service.	
Proved - - - -	Dismissed his ship.	
Proved - - - -	From the extraordinary and parental anxiety manifested by the prisoner on all occasions for the well-doing and general instruction of all the young gentlemen on board his ship, and looking at the circumstances under which the punishment was inflicted, only severely reprimanded.	
Proved - - - -	Dismissed the service.	
Proved - - - -	Dismissed his ship, and to forfeit all the time he had served as a warrant officer towards any superannuation or pension to which he might hereafter become entitled.	
Proved - - - -	Dismissed the service.	
Sir C. Sullivan acquitted of all blame excepting his omitting to direct the acting master to keep the lead going. The acting master failed to order the lead to be hove.	Sir C. Sullivan admonished. The acting master reprimanded, and the rest of the officers and crew acquitted.	
Fully proved - - -	Dismissed his ship, and reduced to a second class warrant officer.	
Fully proved - - -	Dismissed the service, and rendered incapable of ever serving again.	
Sufficient measures were not taken by the lieutenant and Mr. Griffiths, second master, to ascertain the exact position of the said ship when the pilot left her.	Lieutenant G. Oldmixon admonished, Mr. Griffiths, second master, severely reprimanded; the rest of the officers and crew acquitted.	
Proved with the exception of mutinous conduct.	Dismissed the service, and imprisoned for two years.	
Proved - - - -	Dismissed the service.	
Proved - - - -	To be imprisoned for six months, and to be mulct of all pay and sums of money due to him for his services in the Royal Navy.	
Proved - - - -	Dismissed the service, and rendered incapable of ever serving again.	
Proved - - - -	In consideration of his previous good character, only to be disrated from boatswain's mate, and to be imprisoned in one of Her Majesty's gaols for twelve months, *and kept to hard labour*.	Vide page 151.
Proved - - - -	Discharged from the service with disgrace.	
Proved - - - -	Dismissed the service.	
In part proved - - -	In consideration of circumstances, only to be severely reprimanded.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1843. Oct. 26.	N. Nedwick -	Marine	Ocean -	Desertion - - - - -
Dec. 19.	W. H. Christie	Master's assistant.	Swift -	Making away with a quantity of spirits, the property of Her Majesty.
Dec. 27.	S. Morrish -	Master's assistant.	Avon -	Falsely accusing and unjustly punishing J. S. Curtis, seaman.
1844. Jan. 5.	C. Meeking -	Seaman	Minden -	Desertion - - - - -
	H. Gardener -	Seaman		
Jan. 11.	C. B. Strong	Lieutenant	Queen -	Absenting himself without leave -
Feb. 6.	H. Hunter -	2nd Master	Imaum -	Insubordination and drunkenness -
Feb. 7.	G. G. Phillips -	Lieutenant	Ringdove -	Being off deck in his watch; insolence and disrespect to his commander; disobedience of orders; insubordinate conduct and language unbecoming the character of an officer.
Feb. 12.	P. H. Dyke -	Lieutenant	Iris -	For false and malicious assertions respecting Captain Lee, Royal Marines.
Feb. 26.	H. Board -	Marine	Childers -	Theft - - - - -
Mar. 1.	E. J. Voules -	Lieutenant	Albatross -	Drunkenness; striking Mr. T. E. Gould, acting paymaster and purser of the "Albatross," and unofficerlike conduct.
Mar. 22.	J. Henwood -	Carpenter	Geyser -	Drunkenness - - - -
Mar. 25.	J. Hand -	2nd Class Engineer	Prometheus -	Neglect of duty - - -
May 2.	J. Rance -	Gunner	Pantaloon -	Drunkenness, and absenting himself without leave.
May 17.	W. Sparks -	Carpenter	Victory -	Indecency - - - -
May 30.	C. D. A. Newman	Assistant surgeon.	Lucifer -	For drawing a bill on the Accountant-General of Her Majesty's Navy for upwards of 40*l.*, although he knew that the amount thereof was not due to him for pay or otherwise, and for getting the said bill cashed without obtaining the signature of the commander of the "Lucifer" thereto, and after the commander had refused to sign it.
June 12.	M. S. S. Burney	Master	Cygnet -	For running the "Cygnet" inside the Ower's Light through incapacity.
June 13.	F. F. M. Strong	Master	Pearl -	Drunkenness; contempt and insubordination to his superior officer; neglect of duty and unofficerlike conduct.
June 18.	G. Durbin -	Mate	Alfred -	Neglect of duty; disrespect to his superior officer; leaving a boat and not reporting two of the crew of the said boat, although they were in a drunken state when on duty.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Proved - - - -	To receive 48 lashes, and to be imprisoned six calendar months.	
Proved - - - -	Dismissed the service, and rendered incapable of ever serving again as an officer, and mulct of all pay and allowances due to him.	
Proved - - - -	In consideration of circumstances, only reprimanded.	
Proved - - - -	To receive 100 lashes each.	
Proved - - - -	Dismissed his ship, and placed at the bottom of the list of lieutenants for two years.	
Fully proved - - -	Dismissed the service.	
First charge proved under extenuating circumstances, and that the 2d, 3rd, and 4th charges are fully proved.	Dismissed his ship, and placed at the bottom of the list of lieutenants.	
First charge, partly proved; second charge not proved.	Admonished to be more circumspect in his language in future.	
Proved - - - -	To forfeit all pay due to him, to be dismissed the service with disgrace, and further to be imprisoned for the space of two years in one of Her Majesty's prisons.	
Proved - - - -	Placed at the bottom of the list of lieutenants.	
Proved - - - -	Dismissed from the service.	
Proved - - - -	Dismissed from the service.	
Proved - - - -	Dismissed from the service, and rendered incapable of being ever again employed as a warrant officer in Her Majesty's service.	
Proved - - - -	Dismissed from the service.	
Proved - - - -	Dismissed his ship.	
Proved - - - -	Placed at the bottom of the list of masters, and there to remain for the period of three years from the date hereof.	
First and second charges fully proved; that the fourth charge is proved to be wholly groundless and without foundation; and that the third and fifth charges are not proved.	Dismissed his ship, and placed at the bottom of the list of masters, and there to remain for the period of five years.	
First and third charges not proved Second charge proved.	Most severely reprimanded.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1844. June 25.	J. B. Kinsman	Lieutenant	Wolverene -	Drunkenness - - - -
July 5.	B. A. Wake -	Lieutenant	Ocean -	Disobedience of orders; insubordination and neglect of duty.
July 24.	D. Goodall -	Gunner	Excellent -	For not returning on expiration of leave; disobedience of orders, and resisting the officer sent to take him on board his ship.
July 24.	R. Harper -	Gunner	Childers -	Drunkenness, and absenting himself from duty.
July 24.	J. Noble -	Marine	Madagascar -	For stabbing Mr. F. J. Protheroe, midshipman, in the side with a knife.
July 29.	F. M'Bean -	2nd Master	Spy -	Neglect of duty; drunkenness and insubordination.
July 31.	E. E. Gray -	Lieutenant commanding.	Bonetta -	Disobedience of orders in causing a French vessel to be detained and searched, she having at the time displayed her proper colours indicating the nation to which she belonged, and no sufficient cause having existed for suspecting such colours to be false, and the said lieutenant, E. E. Gray, not possessing the necessary French warrant to authorise his searching and detaining French vessels. For neglect of duty in not stopping the search, and ordering the searching party to return immediately to the "Bonetta," on ascertaining the vessel to be really a French vessel. For neglect of duty as commanding officer by his permitting a case of wine and other articles to be received in the "Bonetta" from the French vessel without ascertaining that due payment had been made for the same, and for not punishing a man belonging to the "Bonetta," who had been detected in taking away cigars from the French vessel.
Aug. 20.	J. Mundy -	Boatswain	Vindictive -	Absenting himself from duty without leave.
Oct. 10.	W. Barnes -	Carpenter's mate.	Resistance -	Using provoking speeches towards and quarrelling with Mr. Lee, boatswain of the said ship, throwing a maul at him, and threatening to take his life.
	...			...
Oct. 17.	J. Lee -	Boatswain	Resistance -	For striking W. Barnes, carpenter's mate of that ship.
Oct. 21.	H. Bartlett -	Seaman	Illustrious -	Striking Robert M'Clarty, captain of the forecastle of that ship.
Oct. 23.	J. Franklin -	Lieutenant	Snake -	For a breach of parts of the 2nd, 27th, and 33rd Articles of War.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Proved - - - -	Dismissed the service.	
First and third charges not proved. Second charge proved.	Reprimanded.	
Proved - - - -	Dismissed the service.	
Proved - - - -	Dismissed the service.	
Proved - - - -	To suffer death - - - -	Transported for life.
Proved - - - -	Dismissed the service.	
First charge proved - - Second charge not proved. Third charge proved in part.	Severely reprimanded, and admonished to be more careful in giving his orders in future.	
Fully proved - - -	Dismissed the service.	
Proved - - - -	To suffer death - - - -	Punishment of death remitted. To be imprisoned for two years, but that the said term of imprisonment may hereafter be shortened.
Proved - - - -	Dismissed the service.	
Proved - - - -	To receive 50 lashes, to be imprisoned for the space of six months, and to be mulct of all pay due to him for the period of his servitude on board the "Illustrious."	
That the charge of a breach of part of the 2d Article of War is not proved, but that the charges of a breach of parts of the 27th and 33rd Articles of War are proved.	Dismissed the service.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1844 Oct. 24.	R. Lowcay	Lieutenant	Bonetta	Drunkenness
Oct. 24.	W. Jackson	Seaman	Warspite	Drunkenness and striking the master-at-arms.
Dec. 9.	W. Nicholson	Boatswain	Snake	Fighting and quarrelling
Dec. 17.	G. Bellis	Mate	Excellent	Disobedience of orders, and being off deck when in charge of the watch.
Dec. 18.	J. Randolph	Seaman	Alecto	Theft
1845. Jan. 13.	W. J. R. Card W. M'Crea C. G. Glinn	Lieutenant Surgeon Lieutenant	Hyacinth	Lieutenant Card and Mr. W. M'Crea, surgeon, for quarrelling; and fighting a duel on the coast of Africa, and also for conduct unbecoming the character of officers in breaking their word pledged, or so far prevaricating or equivocating as to evade and disobey an order. And Lieutenant C. G. Glinn for having also broken his word on the aforesaid occasion, and for being engaged as a second in the aforesaid duel.
Jan. 28.	W. B. G. Johnson	Mate	Alban	Indecency
Mar. 28.	J. Braithwaite	Boatswain	Victory	Absenting himself without leave
Mar. 28.	G. R. Anderson, M.D. W. H. Peach	Acting assistant surgeon. Master's assistant.	Persian	Drunkenness, and conduct unbecoming the character of officers.
June 5.	J. Wood	Colour serjeant.	Electra	Mutinous and abusive language
June 13.	H. Cramer J. Hannay P. P. Parker	Acting-master's assistant. Naval cadet Clerk	Amazon	Unofficerlike conduct, and for repressing payments to the messmen for materials supplied them in their *mess*,; and that Mr. J. Hannay had riotously beaten Mr. P. P. Parker.
June 28.	R. L. Burnard	Master	Racer	Drunkenness
June 28.	G. T. Graham	Mate	Satellite	For leaving the deck in his watch without being relieved, and unofficerlike conduct.
Aug. 4.	J. Hitchcock	Marine	Alfred	Insubordination

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Proved - - - -	In consideration of long servitude only dismissed his ship, severely reprimanded, and admonished to be more careful in future.	
Proved - - - -	To suffer death - - - - - (The Court recommended him to mercy from the circumstance of a hurt he had received in his head which caused a degree of mental excitement and excused the rash act he committed.)	Received a free pardon.
Charge of fighting not proved, but that the charge of quarrelling has been proved.	Reprimanded, and placed at the bottom of the list of boatswains for twelve months.	
Proved - - - -	Severely reprimanded, and to serve for two years as a mate, and not to be eligible for promotion until after that period.	
Proved - - - -	To receive 50 lashes, to be mulct of six months' pay, and discharged, with disgrace, from the service.	
All the charges fully proved against Lieut. W. J. R. Card, being breaches of the 2nd and 23rd Articles of War. That the charges of quarrelling and fighting a duel are proved against Mr. W. M'Crea, surgeon, but under circumstances of great provocation; and that the remaining charge is also proved against him, being breaches also of the 2nd and 23rd Articles of war.	Lieutenant W. J. R. Card to be dismissed his ship, and placed at the bottom of the list of lieutenants, from which he is not to rise until the expiration of three years. Mr. W. M'Crea, surgeon, to be placed at the bottom of the list of surgeons in the Royal Navy.	
Also that the charges brought against Lieut. C. G. Glinn are proved.	Lieutenant C. G. Glinn to be dismissed his ship and placed at the bottom of the list of lieutenants in the Royal Navy.	
Fully proved - - -	Dismissed the service, and rendered incapable of ever being employed in Her Majesty's service again.	
Proved - - - -	Dismissed the service.	
Dr. G. R. Anderson guilty of the first charge, and not guilty of the second charge.	Dismissed his ship, and to lose all his time as an Assistant surgeon.	
Charges proved against Mr. W. H. Peach.	Dismissed the service.	
Fully proved - - -	Dismissed the service, and rendered incapable of ever serving Her Majesty again as a non-commissioned officer.	
Charges proved against Mr. H. Cramer.	To be discharged from the service with disgrace, and rendered incapable of ever serving Her Majesty, her heirs and successors.	
First charge not proved against Mr. Hannay; second charge proved.	The same.	
First and second charges not proved against Mr. P. P. Parker; third charge proved.	Dismissed the service.	
Fully proved - - -	Dismissed the service.	
Proved - - - -	Severely reprimanded.	
Proved - - - -	To receive 36 lashes, and to be imprisoned	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1845.				
Aug. 28.	G. White	Seaman	Amazon	Mutinous conduct and desertion
Sept. 25.	F. G. Leigh	Lieutenant	Stromboli	For oppressive conduct unbecoming the character of an officer.
Oct. 13.	G. Bellis	Mate	Eagle	Drunkenness
Oct. 14.	T. Ward	3d Engineer	Agincourt	Absenting himself without leave
Oct. 16.	L. P. Burrell	Lieutenant	Superb	Disobedience of orders, and for a breach of the 27th Article of War.
Oct. 21.	J. Daly	Lieutenant	Melampus	Indecency
1846. March 6.	B. Young	Lieutenant	Persian	Drunkenness
May 1.	R. A. Godson	Paymaster and pursor.	Serpent	Drunkenness and calling Lieutenant Phayre, a fool.
June 24.	J. F. C. Hamilton	Lieutenant	Racer	Contempt
June 26.	G. W. Winlo	Lieutenant	Racer	Drunkenness
June 27.	F. H. Harper	Lieutenant	Satellite	Drunkenness
July 28.	J. Sayer	Marine	Queen	Striking the Serjeant of Marines
Aug. 26.	Hon. J. Gordon	Captain	America	Disobedience of orders in leaving his station without leave.
Sept. 8.	W. Johnston D. Douglas C. Wright	1st Engineer 2d Engineer 3d Engineer	Hecla	Contempt and disobedience of orders
Nov. 28.	D. Brown	Seaman	Dædalus	Drunkenness and riotous conduct
1847. Jan. 5.	T. K. Beatty	Assistant surgeon.	Daphne	Disrespectful language to the surgeon.
Jan. 19.	T. C. R. Gill	Lieutenant	Mutine	Drunkenness
Jan. 23.	J. J. Onslow D. Jago	Captain, Master.	Daphne	Negligently running the said ship on shore, and Captain Onslow omitting to report the circumstance to the commander-in-chief.
Feb. 12.	J. B. Cragg, the officers and crew.	Commander	Sphynx	Running the said ship on shore, through negligence.
Feb. 22.	A. Gilbert	Clerk in charge.	Bonetta	For having with a fraudulent intention made erasures in the muster-book, and for having made false

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
	in Her Majesty's gaol at Winchester for three calendar months, *and during that time to be kept to hard labour.*	Vide page 151.
Proved - - - -	To suffer death - - - -	Recommended strongly to mercy.
Proved - - - -	Severely reprimanded. - - -	Vide page 142.
Fully proved - - -	Dismissed the service.	
Proved - - - -	Dismissed the service.	
First charge not proved; second charge proved.	Dismissed the service.	
Proved - - - -	Dismissed the service.	
Fully proved - - -	Dismissed his ship, and placed at the bottom of the list of lieutenants, there to remain.	
Fully proved - - -	Dismissed the service.	
Proved - - - -	Dismissed the service.	
Proved - - - -	Dismissed the service.	
Proved - - - -	Dismissed the service.	
Proved - - - -	To suffer death.	
Fully proved - - -	In consideration of circumstances, only to be severely reprimanded.	
Proved against Mr. Johnston -	Mr. Johnston dismissed his ship, mulct of all pay, and to serve as a 2d class engineer for one year.	
That the charge against Mr. D. Douglas, acting 2d class engineer, is not proved in consequence of a technical informality in the charge which designates him as a 2d class engineer, whereas he is only an acting 2d class engineer.	Mr. Douglas acquitted. - - -	Vide page 121.
Proved against Mr. C. Wright -	Mr. Wright to be mulct of all pay due to him, and not to be advanced in rank for one year.	
Proved - - - -	To receive 80 lashes.	
Fully proved - - -	Dismissed the service.	
Proved - - - -	Dismissed the service.	
Fully proved - - -	Captain Onslow reprimanded for not reporting the circumstance to the commander-in-chief. Captain Onslow and Mr. Jago, reprimanded for running the said ship on shore.	
Fully proved against Commander Cragg, and Mr. J. Wallis, master.	Commander Cragg, dismissed his ship and placed at the bottom of the list of commanders.	
	Mr. J. Wallis dismissed his ship and to be reduced from the rank of master, *and to serve as a second master*, and not to be eligible for promotion for one year.	Vide page 143.
In part proved - - -	To be cashiered and rendered incapable of further employment in the naval service.	

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1847.				charges of slop clothing against men who had deserted.
Mar. 13.	J. Savage	Seaman	St. Vincent	Desertion
Mar. 19.	J. Barton	Marine	Salamander	Mutinous words and for striking and threatening to kill the serjeant.
Mar. 31.	J. W. Saunders	Master	Electra	Intoxication; constant inaccuracy in his navigation and general carelessness about his duty.
April 1.	C. S. Dunbar	Lieutenant	Iris	For sleeping on his watch
April 6.	E. C. Homershaw	Second master.	Agincourt	Neglect of duty; disobedience of orders and disrespect.
April 13.	J. Smith	Seaman	Recruit	Desertion
April 29.	J. Wilson	Acting paymaster and purser.	Favorite	Drunkenness
April 30.	P. R. E. Loney	Acting paymaster and purser.	Star	Keeping his accounts in an irregular manner, and for being deficient of public money entrusted to him.
April 30.	E. H. Alston	Lieutenant	Pantaloon	Indecency
May 3.	A. Boyle, the officers and crew.	Commander	Thunderbolt	For the loss of that ship in Algoa Bay
May 19.	T. Gresham	Lieutenant	Melampus	Mutinous conduct towards the first lieutenant.
June 5.	R. Taylor	Seaman	Amphion	Desertion
Aug. 25.	J. Connor	Seaman	Agincourt	Striking a naval cadet
Oct. 5.	E. Crowther	Carpenter	Scout	Drunkenness
Dec. 2.	W. Swinburn	Lieutenant	Wanderer	Disobedience of orders and disrespect when on board the "Britomart."
1848. Jan. 25.	C. Payne	Second lieutenant R. M.	Queen	Neglect of duty and disobedience of orders.
Oct. 7.	N. B. Bedingfield	Lieutenant	Hecate	Quitting the deck during his watch
Oct. 9.	E. C. T. D'Eyncourt. F. B. Henwood	Commander Acting Master.	Comus	Running that ship on shore in the river Plate.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Proved - - - -	To receive 50 lashes, and to be imprisoned in Her Majesty's Gaol at Winchester for twelve months, *and kept to hard labour.*	Vide page 151.
Fully proved - - -	To suffer death.	
Fully proved - - -	Dismissed the service.	
Proved - - - -	Taking into consideration his previous good character, to be dismissed his ship and placed at the bottom of the list of lieutenants.	
First charge partly proved; second charge not proved; third charge fully proved.	Severely reprimanded and dismissed his ship.	
Fully proved - - -	To receive 50 lashes, to forfeit all pay due to him; and to be imprisoned twelve months, *and kept to hard labour.*	Vide page 151.
Proved - - - -	Dismissed the service.	
Fully proved - - -	Dismissed the service.	
Proved - - - -	Dismissed the service.	
Negligence on the part of Commander Boyle, and Mr. J. D. Milne, Master.	Commander Boyle and Mr. J. D. Milne dismissed the service, the rest of the officers and crew acquitted.	
Proved - - - -	In consideration of his previous good character, only to be dismissed his ship and placed at the bottom of the list of lieutenants for two years.	
Fully proved - - -	To be imprisoned, *and kept to hard labour for six months, the first and last fourteen days of such time to be in solitary confinement,* at the expiration of that time to be compelled to serve in one of Her Majesty's ships in foreign parts for the term of five years.	Vide page 151.
Fully proved - - -	To suffer death - - - -	Commuted.
Proved - - - -	To be dismissed from his employment as carpenter in the Royal Navy, and to serve as carpenter's crew in one of Her Majesty's ships.	
Proved - - - -	To be placed at the bottom of the list of lieutenants and not to rise therefrom for one year.	
Proved - - - -	Severely reprimanded, placed at the bottom of the list of second lieutenants, and not to rise therefrom for the term of two years.	
Proved - - - -	In consideration of circumstances, only to be most severely reprimanded,	
No blame imputable to the Commander.	Commander E. C. T. D'Eyncourt acquitted.	
Negligence on the part of the acting master.	Acting master dismissed his ship, *and to serve as a second master.*	Vide page 143.

Date of Trial.	Name of the Party tried.	Quality.	Ship.	Nature of the Charge.
1848. March 6.	T.B. Brown, officers and crew.	Commander	Snake - -	Loss of that ship on the east coast of Africa.
April 19.	J. J. Winne -	Lieutenant R. M.	Apollo - -	Drunkenness - - - - -
May 22.	J. Christie -	Assistant surgeon.	Raleigh -	Breach of the 23d Article of War -
	A. Jackson -	Assistant surgeon.		
June 27.	W. Green -	Marine	Inconstant -	Theft - - - - - -
	J. Richards -	Marine		
July 7.	J. M'Donald -	Marine	Bellerophon -	Striking his superior officer - - -
Aug. 3.	N. B. Bedingfield	Lieutenant	Hecate -	Insubordination and disrespect. Disobedience of orders.
Aug. 12.	J. Warren -	Boatswain	Andromeda -	For refusing to inflict corporal punishment lawfully ordered on a seaman.
Oct. 6.	P. F. E. Daniel	Lieutenant R. M.	Powerful -	Unofficerlike conduct in inducing two midshipmen to endorse a check drawn by him upon Messrs. Grant & Co., with whom he had no effects.

Finding of the Sentence.	Punishment awarded.	Remarks, &c.
Not sufficient care on the part of the Commander and Mr. Chourn, Master.	Commander and master to lose one year's rank, the rest of the officers and crew acquitted.	
Proved - - - -	Dismissed the service.	
Proved - - - -	Severely reprimanded, and to lose one year's time in Her Majesty's service.	
Proved - - - -	Mulct of all pay and time, to be imprisoned for two years, *the first six months of which time to be kept to hard labour*.	Vide page 151.
Fully proved - - -	To be transported beyond the seas for the term of his natural life.	This sentence being illegal, was not carried into execution. Vide page 151.
First charge fully proved; second charge proved.	Dismissed his ship, and to lose one year's rank.	
Fully proved - - -	Dismissed the service.	
Fully proved - - -	Dismissed his ship and placed at the bottom of the list of lieutenants. And not to be employed again in active service.	

APPENDIX.

No. I.

As to the Power of the Court in dispensing with the Attendance of any particular Member.

COPY of a LETTER from CAPTAIN M'KENZIE, of H. M. S. the Cornwall, in Hamoaze, to the Secretary of the Admiralty, dated 27th October, 1765.

"Be pleased to acquaint their Lordships, that in obedience to their order of the 10th October, 1765, directing the captain of His Majesty's ships and vessels at Plymouth next in command to Captain Lloyd of the Fame, to assemble a court-martial for the trial of William Skane, a deserter from His Majesty's ship Fame, transmitted to me by Lord Edgecombe, I made the signal for assembling a court-martial on board His Majesty's ship under my command, on Saturday, the 26th instant, but found it impossible to form a court for proceeding to trial, from the following reasons: —

"There being nine of His Majesty's ships in commission at this port, none of whose captains are absent upon leave, and the Act directing that no court-martial held by virtue of the said Act shall consist of more than thirteen, or of less than five persons, to be composed of such flag officers, captains, or commanders, then and there present as are next in seniority to the officer who presides at the court-martial.

"Five captains only did assemble of the ships then and there in commission, so that three were absent, ill health preventing their attendance. It was doubted whether the

Act does allow to dispense on any account whatever with the absence of any of the captains or commanders then and there present as are next in seniority to the officer who presides at the court-martial, according to the words of the said Act. I therefore beg you will be pleased to signify this difficulty to their Lordships, that opinion may be had whether the said Act does allow of any such absence of captains, and if it does, under what circumstances, and the proofs which are necessary to justify the legal proceeding of a court-martial.

"I have communicated this to Lord Edgecombe, who has directed me to apply to their Lordships; and as I differ in opinion from Captain Loggie and Captain Collier, who were the gentlemen that raised the difficulty, I shall continue to make the signal, and give my attendance from day to day, until those gentlemen are able to attend, or I receive their Lordships' directions."

Opinion.

It appears to have been the intention of the Legislature, by the Act of the 22 Geo. 2., that every court-martial should be composed, if possible, of senior officers; but though the words of the statute are, that no court-martial shall consist of more than thirteen, or less than five persons, to be composed of such officers as are next in seniority to the officer who presides, they can never, I think, be understood to mean that the next in seniority to the president, who happen to be present on the same station with their ships, should all attend in order, at all events, and notwithstanding any impediment whatever, — or otherwise, that no legal court can be held. For such a construction seems not only unreasonable, as well as detrimental, to His Majesty's service, by rendering it extremely difficult to make a court, but also to be very contrary to the general tenor of other parts of the Act which appear calculated to expedite justice as much as possible, by permitting five captains to constitute a Court,

and even by allowing commanders to assist where a sufficient number of post-captains is not to be found.

And as I observe that every court-martial has an express power by the 15th section of the statute, to dispense with the presence of any member, and suffer him to go on shore (in case of illness), even after a trial is begun, there seems to be no reason to doubt but that any officer may be excused from attendance by the president of the court, if a just reason is assigned, before a trial is begun; and that they may afterwards proceed to business, if the remaining number of qualified officers is sufficient to constitute a court-martial. I therefore apprehend that Mr. M'Kenzie and the five other captains may legally assemble to try William Skane, if it is taken down in the minutes that the absent and senior officers have certified the president, by letter, or otherwise, of their inability to attend through ill health.

(Signed) G. HARRIS.

Doctors' Commons, Nov. 4. 1765.

No. II.

The Order for assembling a Court-Martial should be addressed to the first, second, or third Officer in command by Names.

In the month of October, 1767, the Lords Commissioners of the Admiralty issued an order to the senior captain of His Majesty's ships at Plymouth, to assemble a court-martial, for the trial of John Shaw, a seaman, belonging to His Majesty's ship "Fame," for stealing a gun-tackle. The court-martial was accordingly summoned, and the evening before the trial a senior officer came into port, intending to sail early in the morning; but was detained until the afternoon, and after the court-martial

had met. It was doubted whether the proceedings of such Court were legal, as the senior officer present had not attended. Mr. Hussey's opinion on the case was as follows: —

"As this is a power given by an Act of Parliament, to try offenders in a particular mode, it must be very strictly pursued; and, therefore, I am inclined to think that Captain Shuldam could not sit as president at a court-martial, by virtue of this warrant, there being at the same time a captain senior to him in the port; but as it may be doubtful whether, upon the receipt of the order, if he was the senior captain, the jurisdiction might not be attached in him, and consequently the trial legal, I presume to take the liberty to recommend (in the present case) to their lordships the pardoning of the offender, rather than trying him again; and as it may be of importance to the service to obviate any doubts of the same nature for the future, I think the order should be directed to the 1st, 2nd, or 3rd in command, by names, which is more conformable, in my apprehension, to the intention of the legislature, than the direction to the senior, as in the present case.

(Signed) R. Hussey."

No. III.

Whether the Members of a Court-Martial who are called upon to give Evidence must, after doing so, necessarily be excluded from the Court.

CASE.

The Act 22 Geo. 2. cap. 33. sect. 11. enacts, That "from and after the 25th day of December, 1749, it shall be lawful for the said Lord High Admiral of Great Britain, or the commissioners for executing the office of lord high admiral for the time being, and they are hereby respectively authorized from time to time, as there shall be occasion, to direct any

flag-officer or captain of any of His Majesty's ships-of-war, who shall be in any port of Great Britain or Ireland, to hold courts-martial in any such port, provided such flag-officer or captain be the 1st, 2nd, or 3rd in command in such port, as shall be found most expedient, and for the good of His Majesty's service. And such flag-officer or captain so directed to hold courts-martial shall preside at such courts-martial, anything herein contained to the contrary notwithstanding."

Sect. 12. That "from and after the 25th day of December, 1749, no court-martial to be held or appointed by virtue of this power shall consist of more than thirteen or of less than five persons, *to be composed of such flag-officers, captains, or commanders, then and there present, as are next in seniority to the officer who presides at the court-martial.*"

Notwithstanding the words in italics in the 12th section, the usage at courts-martial has been for officers who have given evidence at the trials, not to sit as members of the Court, although they were senior to others who sat, and, consequently, would have sat as members if they had not been examined as witnesses.

The Lords Commissioners of the Admiralty having lately received a complaint, in writing, charging an officer of rank in the Royal Navy with one of the offences specified in the Articles of War, which are created and set forth by the above-mentioned Act of Parliament; their Lordships have therefore thought fit to issue their order or warrant in writing to Admiral Sir Thomas Pye, at Portsmouth, requiring him, forthwith, to assemble a court-martial for the trial of the said officer: and it having been suggested to their Lordships, that several officers and commanders of the king's ships at Portsmouth (who, on account of their seniority, must sit as members of the said court-martial, if the letter of the 12th section in the said Act is conformed to) will be summoned as witnesses, either in support of the charge, or in behalf of the accused:

You are therefore requested to advise their lordships whether, in case such senior officers should be called upon to give evidence at the trial, they may likewise sit as members of the court-martial? And also, whether the Court can be legally held without the senior officers (who shall happen to be called to give evidence) in case it is necessary for their juniors to sit as members, in order to make up the number required by the statute to constitute a Court?

Opinion.

The usage of the service is very material upon this case, for naval courts-martial are evidently considered, in the statutes concerning them, as known and established Courts; consequently, in matters not specially provided for, the settled course of proceeding must have great weight. That the characters of witness and judge, are not consistent, is very obvious; and though in the common law of England, there is no challenge to a judge, yet, in the only instance we know where judges were called upon to give evidence in a criminal case, it is observed that they sat no more during that trial. By a strict and literal construction of the statute 22 Geo. 2. cap. 33. sec. 12, neither the prosecutor nor the prisoner would cease to be judges; but this construction would be absurd, and the Act must, from common sense, admit, as the usage is, that officers to whom there is a just ground of exception, or who have a just ground of excuse, shall not be included in the number of those of whom the Court is to be composed; consequently, if an officer, entitled by his rank to sit, is either prosecutor, party, or witness, the person next in seniority must supply his place; and the Court so composed will be legally held according to the intent of the Act.

(Signed) A. Wedderburn.
James Wallace.
F. C. Cust.

No. IV.

Whether Lieutenants who are acting as Commanders are eligible to sit as Members of a Court-Martial.

On the 3rd of September, 1789, six seamen belonging to His Majesty's ship "Ambuscade" were tried by court-martial for robbery, — two of whom were sentenced to suffer death. A doubt arose whether Mr. Thomas Peyton, an acting master and commander, was qualified to sit as a member of the Court; whereupon Rear-Admiral Peyton delayed the execution of the sentence until he should receive instructions from the Admiralty. The case was submitted to the law officers of the crown, and subsequently to the twelve judges, who delivered the following opinion: —

"To the King's Most Excellent Majesty in Council.

"May it please your Majesty, —

"In obedience to your Majesty's commands, signified to us by your Majesty's order in council dated the 2nd September, 1791, we have taken into our consideration the memorial thereby referred to us and the case thereto annexed; and we are of opinion that the court-martial held for the trial of six persons therein named was not legally constituted, because we conceive that Lieutenant Peyton, acting commander of your Majesty's sloop 'Bulldog,' who sat on that court-martial, was not a commander within the meaning of the Act of the 22nd year of His late Majesty King George the Second.*

(Signed)	KENYON.	R. PERRYER.
	LOUGHBOROUGH.	F. BULLER.
	JAS. EYRE.	J. HEATH.
	H. GOULD.	J. WILSON.
	W. H. ASHHURST.	N. GROSE.
	B. HOTHAM.	A. THOMSON."

* The above opinion would of course apply also to commanders acting as post-captains.

No. V.

Position which the Captain of the Fleet is to occupy at a Court-Martial.

"Sir, 'Royal William,' 4th July, 1791.

"You will be pleased to inform the Lords Commissioners of the Admiralty, that, pursuant to their Lordships' order, the flag-officers and captains assembled this morning on board the said ship for the purpose of composing a court-martial for the trial of Thomas Jones, a seaman, belonging to his Majesty's sloop 'Speedy,' on charges therein mentioned; but a doubt having arisen in the minds of some of the members whether Sir Hyde Parker (who comes within the number of persons directed by the Act of Parliament to compose the Court) should take his seat at the court-martial next the junior rear-admiral, as first captain to the commander-in-chief, in preference to captains who will also compose part of the Court, and who are senior to him on the list; or whether he should take his seat as a captain, according to his seniority on the list; I am requested to desire their Lordships will be pleased to order their solicitor to state the case for the opinion of such counsel as they shall think proper on the questions hereunder written:—

"1st. Whether Sir Hyde Parker, as first captain to a commander-in-chief commanding twenty sail of the line and upwards, being by his seniority on the list of captains within the number of persons directed by the 12th section of the Act of 22 Geo. 2. to compose the Court, has a right to take place at courts-martial next to the junior rear-admiral in preference to captains senior to him on the list, pursuant to the article of the naval instructions, under the title of 'Rank and Command?'

"2nd. Supposing Sir Hyde Parker, as first captain to

such commander-in-chief, should be admitted to take place next to the junior rear-admiral, whether or not his vote being given in that place, when there are two captains sitting who are senior to him on the list, is consistent with the 7th article of the naval instructions, under the title of 'Courts-Martial,' which directs, *that the youngest members shall vote first, proceeding in order up to the president;* and whether or not a sentence being given in such case may not subject the members of the Court to be called on by a superior court of law for illegality in their proceedings.

"I am, &c.

(Signed) W. HOTHAM."

"P. STEPHENS, ESQ."

Opinion of the Law Officers on the above case.

Having considered the King's instructions, and the Act of 22 Geo. 2. cap. 33., and the usage which has obtained since that Act passed; we are of opinion, that the first captain to the commander-in-chief, when a member of the court-martial, according to that Act, has a right to take place next to the junior rear-admiral, and to vote according to that rank.

(Signed) WM. SCOTT.
A. MACDONALD.
JOHN SCOTT.
F. C. CUST.

July 14th, 1791.

No. VI.

In what cases Commanders may be called upon to sit as Members of a Court-Martial.

On the 27th September, 1796, a court-martial assembled on board H. M. S. "Tremendous," in Table Bay, Cape of

Good Hope, for the trial of Duncan Campbell, a seaman belonging to H. M. S. "La Sybille," for absenting himself without leave. The Court was composed of twelve members, two of whom were acting post-captains. It was doubted whether, according to the 12th and 14 sections of the Act 22 Geo. 2. cap. 33. the proceedings of a court-martial so constituted were legal. The opinion of His Majesty's Attorney General and Solicitor General, and the counsel for the affairs of the Admiralty, to whom the question was referred was as follows:—

"We are of opinion that under the 14th section of the Act referred to, the only case in which commanders under the rank and degree of a post-captain can be called to a court-martial, is when there are not less than three nor yet so many as five officers of the degree and denomination of a post-captain or of a superior rank to be found. And as in the cases stated there were more than five officers of the rank of post-captain, exclusive of Captains Gardner and Kemp, they could not be competent to sit upon the court-martial unless they were of the rank and degree of post-captains. We apprehend that they had commissions only as commanders of sloops, and were appointed to act as captains of the 'Dodrecht' and 'Lively' during the absence of the officers who were captains of those ships, and we are of opinion that such an appointment *pro tempore* did not give them the rank and degree of post-captains, and consequently they were not competent to sit upon the court-martial; the proceedings upon which we therefore conceive to have been irregular, and the trial and sentence illegal and void.

(Signed) JOHN SCOTT.
JOHN MITFORD.
S. PERCEVAL."

January 13th, 1797.

No. VII.

Whether the Captain of a Ship lost which renders him in a state of personal Accusation, and subject to Trial by Court-Martial, renders him ineligible to sit himself at a Court-Martial.

CASE.

On the 6th of April, 1798, a court-martial assembled on board His Majesty's ship "Prince," for the trial of William Kerr, a seaman belonging to His Majesty's ship "Phœnix," for desertion. The members composing the Court previous to their being sworn took into their consideration the case and situation of the Honourable Captain Curzon of His Majesty's ship "Pallas," which ship was driven on shore in a violent gale of wind, and wrecked in Plymouth Sound on the 4th of April, 1798; and as Captain Curzon, by the established rules of and practice of the service, would have to be tried by a court-martial for the loss of the said ship, and was therefore then in state of presumed accusation, the members were ten against three, that the circumstances under which Captain Curzon stood rendered him ineligible to sit at a court-martial. The Lords Commissioners of the Admiralty directed this case to be laid before His Majesty's Attorney-General, Solicitor-General, and the Counsel for the Admiralty, for their opinion on the point in question.

Opinion.

We understand that Captain Fayerman was junior captain to Captain Curzon, and that consequently, if Captain Curzon was qualified to sit upon the court-martial, the Court was illegally constituted by the presence of Captain

Fayerman, and the sentence void. The question therefore is, whether Captain Curzon can be considered as a captain and commander then and there present within the meaning of the 12th sect. of 22 Geo. 2. cap. 33.

We think that section was intended to apply only to captains and commanders of *vessels* then and there present; and that, unless the twenty-first section has the effect of placing Captain Curzon until he should be tried by a court-martial or discharged from His Majesty's service, or removed into another ship in the same situation, to all intents and purposes as if his ship had not been lost, he cannot be deemed a captain or commander within the meaning of the twelfth section. We think that the words in the twenty-first section, declaring that the command, power, and authority, given to the officers of a ship lost shall remain in force were only intended to apply to the power, command, and authority, which those officers had over their crews before the ship was lost, and to make such officers and their crews liable to punishment for acting contrary to naval discipline after the loss of the ship, and conditionally to preserve their pay; but not to put them *generally* in the same situation as if the ship had not been lost; and, therefore, it seems to us that the court-martial was properly constituted and their sentence legal.

(Signed) JOHN SCOTT.
JOHN MITFORD.
SP. PERCEVAL.

Lincoln's Inn, April 17. 1798.

No. VIII.

Case of a Court-Martial proceeding to Trial and Sentence in the presence of a Captain who ought to have been a Member of the Court, but whose arrival was not made known until some time subsequent to the Court being sworn.

"A court-martial was sworn at Sheerness on the 14th day of September, 1798, consisting of ten captains only, at half past 11 before noon, to try the surgeon of His Majesty's bomb vessel 'Zebra,' on charges exhibited against him by the captain of the said vessel.

"Captain Bennett, commander of His Majesty's ship 'Amphion' (senior to Sir Charles Lindsay, Bart., of the 'Daphne,' one of the members sworn), arrived at the Great Nore, and went on board the 'Zealand,' the flag ship of the commander-in-chief, for orders at half past ten, one hour before the Court was sworn, the 'Amphion' then run to the Little Nore, where she anchored at 20 minutes past 12.

"The Court, when sworn, was perfectly ignorant of the arrival, and even the appearance, of the 'Amphion.'

"*Query.*—Was such court lawful?

"I am, &c.

(Signed) H. STANHOPE."

Opinion of Mr. Perceval.

The question, as I apprehend it, is, whether the captain of the "Amphion" was within the meaning of the words in the 22 Geo. 2. cap. 33. to be considered as *then and there present*, at the time the court-martial was sworn in He certainly was not so at the time when it was appointed

and summoned; and it appears to me that his presence ought to have been known to the court-martial, in order to make their proceedings without him illegal. It appears further that he did not come to an anchor till after the court-martial was sworn in. I do not see how the line can be drawn to exclude any senior captain who may be sailing within sight when the court-martial is assembled, unless by holding that he must come to an anchor before it is so assembled. I am, therefore, of opinion that the court-martial may legally proceed with the trial and the sentence.

(Signed) Sp. Perceval.

Lincoln's Inn, Sept. 16. 1798.

No. IX.

Whether the Captain of a Ship that has sailed from, and is out of sight of, but still within the Limits of, a Port, ought to sit as a Member of a Court-Martial assembled at such Port, and whether its Proceedings are invalidated by his Absence.

Copy of a Letter from Rear Admiral the Honourable George Berkeley to Admiral Millbank, Commander-in-Chief of H. M. Ships at Portsmouth, dated 31st March, 1800.

"Sir,

"In obedience to orders I received, directing me to assemble a court-martial on board H. M. S. 'Gladiator,' the signal was made; and, upon calling over the Court, an objection was started by Captain Pickmore to the legality of it, as not consisting of the thirteen senior officers at this port, according to the Act of Parliament, as Captain Foley, of the 'Elephant,' was not present.

"I therefore think it my duty to state to you the circum-

stance as it happened, that you may lay it before the Lords Commissioners of the Admiralty, that such obstructions may not arise to the service in future from objections being made which their lordships may possibly deem frivolous.

"The 'Elephant' weighed from Spithead this morning before 8 o'clock, and was on her passage to St. Helen's, at which hour the signal was made for a court-martial to be held. The weather came on very thick soon afterwards, which precluded the officer who is stationed for that purpose from seeing and reporting her being actually there. Under the impression, therefore, that she might possibly be at Spithead, Captain Pickmore started this objection; and the Court was obliged to adjourn.

"It becomes necessary, therefore, that some regulation should be laid down to guide future courts-martial, as, by thick weather coming on at any time, it is in the breast of any one officer to surmise that ships may be anchored or not, and to break up a court-martial, by which, as in the present instance, much inconvenience may arise to the service.

"I am, &c.,

(Signed) G. BERKELEY."

Opinion.

The court-martial undoubtedly must consist of the senior officers present at the station or port where it is assembled; nor do I think it possible to lay down any general rule by which the meaning of the word *present* can be defined. What is or is not a *presence* to satisfy the Act must depend upon the circumstances of each case. But it seems to me that in this case, where it is stated that the captain in question had actually set sail from the station, and was, in point of fact, from whatever cause (after having so set sail), out of sight, he must be considered, to all intents and pur-

poses of this Act, not present so as to require his attend ance to constitute a member of the board.

(Signed) S. PERCEVAL.

April 5. 1800.

No. X.

Whether a Court-Martial may legally proceed to Trial in the Absence of senior Officers, who are present in Port, but detained with their Ships in Quarantine.

CASE.

By the 12th section of the Act 22 Geo. 2. c. 33., for the government of the Royal Navy, under which Act naval courts-martial are constituted, it is enacted, "That no court-martial to be held or constituted by virtue of this present Act shall consist of more than thirteen or of less than five persons, to be composed of such flag-officers, captains, or commanders, then and there present, as are next in seniority to the officer who presides at the court-martial."

The object of requiring that they should be taken according to seniority is to prevent any partial selection of judges. The Act makes no provision for the case of officers in the command of ships present at the port where the Court is to be held, who may, by reason of illness or other controlling cause, be incapable of attending to be sworn as members of, and to assist at, a court-martial, according to their seniority, as prescribed by the 12th section of the Act above set forth.

The 19 Geo. 3. c. 17. s. 2. enacts, "That the proceedings of any court-martial shall not be delayed by the absence of any of its members, provided a sufficient number doth remain to compose such Court, which is hereby re-

quired to sit from day to day (Sundays excepted) until the sentence be given;" and that no member of the Court shall absent himself therefrom during the whole course of the trial upon pain of being cashiered, except in case of sickness or other extraordinary and indispensable occasion to be judged of by the said Court.

In order to bring this clause into operation, it is necessary that the Court shall have been formed and assembled; but the enactment of the 12th section of the former Act, which regulates the constitution of the Court, remains unaltered.

It has happened, when it has become necessary to assemble a court-martial, that officers present with their ships at the port where the Court is to be held, and who, according to their seniority, ought, in compliance with the terms of the 12th section, to be members of it, have been prevented from presenting themselves to form part of the Court by reason of illness, or of being with their ships under quarantine (and therefore restrained by law from holding communication with other persons not also in quarantine), at the time when the court-martial has been ordered to assemble; and that officers junior to them, but qualified in all other respects, have attended as members of the court-martial, and who, indeed, in many cases, would actually form part of the Court, even if the first-mentioned officers did attend to make up the number requisite to constitute a court-martial.

The Lords Commissioners of the Admiralty, having in view a case in which certain officers next in seniority to the officer ordered to assemble a court-martial were prevented, by being under quarantine, from attending to be sworn as members of the Court, whereby the public service was retarded, as it was not deemed right to form the Court of junior officers in the presence of officers senior to them, directed Her Majesty's Attorney-General, Solicitor-General, and counsel for the Admiralty, to state "whether, in cases where any officers next in seniority to the officer

who is to be the president of a court-martial, shall, by illness, or by reason of being in quarantine, or under any other unavoidable circumstances, be rendered incapable of giving their attendance, the absence of such officers, provided there is a sufficient number present of others properly qualified and next in seniority (with the exception only of the officers thus incapacitated from attending), would render illegal the constitution of the Court, within the spirit and intention of the legislature?"

Opinion.

We are of opinion that a court-martial constituted under the circumstances supposed would be legally constituted, although officers next in seniority to the officer who is president of the Court do not serve upon it, they being prevented from doing so by illness or other unavoidable cause.

(Signed) J. CAMPBELL.
R. M. ROLFE.
H. SHEPHERD.

April 3. 1839.

No. XI.

Whether the Act of endeavouring to desert to the Enemy justifies a capital Punishment.

By the minutes of proceedings at a court-martial held on board His Majesty's ship "Salvador del Mundo," in Hamoaze, on the 26th June, 1810, it appears that John Hart, Geo. King, and Thos. Boatham, seamen of His Majesty's ship "Defiance," were tried "for having on the night of the 1st of the said month of June deserted or *endeavoured to desert* from her to the enemy, and for

having run away with one of His Majesty's ship's boats, to the weakening of the service."

The following is an extract of the sentence: — "The Court having most maturely and deliberately weighed and considered the evidence in support of the charges, as well as what the prisoners had to offer in their defence, are of opinion that the charges have been proved against the prisoners John Hart, George King, and Thomas Boatham, and do in consequence adjudge the said John Hart, George King, and Thomas Boatham, to be severally hanged by the neck until they are dead, &c."

Thomas Boatham was afterwards recommended to mercy by the Court.

Their Lordships having been pleased to direct the proceedings and sentence to be laid before the Counsel for the affairs of the Admiralty, for his opinion whether there appeared any legal objection to the sentence being carried into execution, that officer gave the following opinion: —

"The 15th article of war in the 22 Geo. 2. c. 33. describes three kinds of aggravated desertion to which the punishment of death is annexed absolutely, viz. — 1st. Desertion to the enemy, &c.; 2dly, Running away with any of His Majesty's ships or vessels of war, or any ordnance, ammunition, stores, or provisions belonging thereto, to the weakening of the service; and, 3rdly, Yielding up the same cowardly or treacherously to the enemy. The warrant upon which the prisoners were tried professes to describe the 1st and 2nd of these offences; but in the description of the 1st it superadds an offence which is not within this article, and for which the prisoners could not by law have been convicted *capitally*,—viz. that of *endeavouring to desert to the enemy:* it even describes the first offence in the alternative 'that the prisoners deserted *or endeavoured to desert to the enemy.*' Had this, therefore, been the only charge against the prisoners, I should have been of opinion that the sentence of this court-martial could not legally

have been carried into execution, not only on account of the manner in which the charge was framed, but also on account of the doubts I should have entertained whether the offence described in this article was complete, the prisoners having been most fortunately apprehended whilst they were deserting, but before they had actually deserted, to the enemy, although there is no doubt but that they might have been convicted of desertion under the 16th art., which brings the punishment in the discretion of the court-martial. They have, however, been charged with, and found guilty of, the 2nd offence described in the 15th article, as to which I do not think that the stores need actually be delivered to the enemy, because that would bring the case within the 3rd offence described in this article; and I do not see any objection to the proceedings of the court-martial upon this charge; but still, as the warrant contained a charge,—namely, that of endeavouring to desert to the enemy, which does not warrant a capital conviction, and as the offence of deserting to the enemy was not complete, and as there is no knowing what effect the evidence which was applicable to that charge so improperly framed may have had upon the minds of some of the members of the court-martial,— I would humbly submit to the Lords Commissioners of the Admiralty whether there are not good and sufficient grounds for applying to His Majesty for a commutation of the punishment of these men from death to that of transportation, although at the same time I am bound to say, that, in point of law, I am of opinion the sentence of this court-martial may be legally carried into execution.

(Signed) T. JERVIS."

"Temple, 1st July, 1810."

No. XII.

As to the Time within which it is necessary to prefer the Complaint in order to justify a Court-Martial in taking cognizance of it.

On the 8th August, 1814, Lieut. Charles T. Leaver was tried by court-martial, for cruel and unofficerlike conduct towards John Ansell, boy, belonging to His Majesty's ship "Martial," and for having by the infliction of excessive punishments caused the death of the said boy.

The following is an extract of the sentence: —

"And having heard such part of the evidence in support of the charges as related to the period of the death of the said John Ansell, — the return of the said sloop 'Martial' to port, next after that event, the date of the complaint to the Right Hon. the Lords Commissioners of the Admiralty, and the date of their Lordships' order for assembling the said Court, and having considered the same, — the Court is of opinion that the complaints in writing against the prisoner, Lieut. Charles T. Leaver, hath *not been made within one year after the return of the* said sloop 'Martial,' *or of the prisoner* into a port of Great Britain *or Ireland,* agreeably to the said Act of the 22d Geo. 2. c. 33., and they do THEREFORE acquit the said Lieut. Charles T. Leaver, and he is hereby acquitted accordingly."

(Signed by the Members of the Court.)

The Lords Commissioners of the Admiralty were pleased to direct His Majesty's Attorney-General and Solicitor-General, and the Counsel for the affairs of the Admiralty, to state their opinion whether the above was a legal sentence.

Opinion.

I am of opinion the court-martial has misconstrued the terms of the Act of Parliament. A person charged of any offence against the naval articles of war may be tried by a court-martial ordered for that purpose within three years after the offence committed, though the ship or the accused may have returned to Great Britain more than a year before any complaint be made, or court-martial ordered — the two latter branches of the clause limiting the time of trial to a year after the ship's return, or the return of the accused is a superadded period to the three years mentioned in the former part of the clause, in order to give the extended period of a year after such respective returns of the ship or the delinquents, in cases where no trial could be had within the three years after the offence committed. The same limitation and extension of time applies generally to the complaint of the offence to be made in writing; so that it is sufficient if the complaint be made within three years after the offence committed, though the ship or the party may have returned more than one year before such complaint be made.

As the sentence of the court-martial states the reason for the acquittal to be that the Court did not think they had jurisdiction to try, we are of opinion that the accused may be tried again, and that another court-martial may be ordered to try the offender, and if he should plead his former acquittal, and produce the sentence, it will appear by such sentence that he has never been tried for the offence, from a supposed want of jurisdiction in the court-martial.

(Signed) S. SHEPHERD.

I entirely concur in this opinion.

(Signed) T. JERVIS.

I concur with Mr. Solicitor-General in his opinion above stated.

(Signed) W. GARROW.

August 12th, 1814.

No. XIII.

Opinion of Mr. Jervis as to whether a Court-Martial can legally assemble and try Lieutenant Dobson late of His Majesty's Ship "Brevdrageren," for an unnatural crime, committed in September, 1809, but not reported until October, 1811, the accused having returned to this Country upwards of one Year.

I am of opinion, that as three years have not expired since the commission of the offence with which Lieutenant Dobson is charged, the Lords Commissioners of the Admiralty may now, in their discretion, direct a court-martial to be held upon him for such offence, notwithstanding he may have returned to this country more than one year.

November, 1811.

No. XIV.

Whether the inadvertent Omission of the Date, in the Order to assemble a Court-Martial, do not render the Proceedings had in consequence thereof illegal.

On the 27th of July, 1796, Vice-Admiral Murray directed a court-martial to assemble and try George Harvey and William Gleeson, seamen, belonging to His Majesty's ship "Bermuda," for endeavouring to make a mutinous assembly on board that ship. By some inadvertence the vice-admiral's order was not dated: this omission appears to have escaped the observation of the Court, for they proceeded to trial, and sentenced the prisoners to suffer death.

The Lords Commissioners of the Admiralty directed this

case to be laid before His Majesty's Attorney-General and Solicitor-General and the Counsel for the Admiralty for their opinion, whether the inadvertent omission of the date in the order of Vice-Admiral Murray, above-mentioned, did not render the proceeding, had in consequence thereof illegal?

Opinion.

We think the omission of the date in the order of Vice-Admiral Murray above-mentioned did not render the proceedings had in consequence thereof illegal.

(Signed) JOHN SCOTT.
JOHN MITFORD.
SP. PERCEVAL.

Lincoln's Inn, Nov. 10th, 1797.

No. XV.

Whether a Court-Martial has the Power to sentence an Offender to be transported, or imprisoned with hard Labour, or kept in solitary Confinement.

In 1797, the members of a court-martial requested to be informed "whether a naval court-martial, by virtue of the Act 22 Geo. 2. c. 33., in cases where by the said Act they have the discretionary power of punishing with death, or such other punishment as the Court shall deem the prisoner to deserve, has power to sentence the prisoner to transportation, solitary imprisonment, or hard labour, or to inflict other than the usual corporal punishment or imprisonment for any term not exceeding two years?"

Opinion.

It is quite clear from section 3d of the Act referred to, that the court-martial cannot inflict the sentence of imprisonment beyond two years; and as to their discretionary power of inflicting such other punishment, except

death, as the Court shall deem the prisoner to deserve, we are of opinion that this discretion must be limited by the usage of the service with respect to sentences of this kind; and we do not think that they can pronounce the sentence of transportation, hard labour, or any sort of imprisonment, except such as has been usual.

(Signed) JOHN SCOTT.
JOHN MITFORD.
S. PERCEVAL.

No. XVI.

In case of Murder, when the Wound is given, and the Party dies on board the Ship, the Body ought not to be subjected to a Coroner's Inquest.

"Admiralty Office, 21st February, 1783.

"Sir,

"I have communicated to my Lords Commissioners of the Admiralty your letter of yesterday's date, informing them that Richard Davis, acting midshipman of the Eurydice, having stabbed John Liddell Palmer, another midshipman, *on board the said ship* on Sunday night last, of which wounds the latter died, you had, on the coroner's application, ordered the body of the deceased to be carried on shore to Gosport, where an inquest was taken, and a verdict of wilful murder found against Richard Davis, whom you directed to be delivered up to the civil magistrate, to take his trial for the murder; and in return, I am commanded by their Lordships to acquaint you, that this being a case cognizable by a court-martial, more especially as the wounds were given and the deceased died *on board the ship*, you ought not to have subjected the body to the coroner's inquest, or to have delivered up Davis to the civil magistrate.

"I am, &c.

(Signed) PHILIP STEPHENS."

No. XVII.

Case of Lieutenant Frye of the Marines, and the Consequences resulting from illegal Proceedings at a Court-Martial.

In the year 1743, Lieutenant Frye, of the marines, serving on board the Oxford man-of-war, was brought to a court-martial, at Port Royal, in Jamaica, by the captain of the ship, for having disobeyed his orders, in refusing to assist another lieutenant in carrying an officer prisoner on board the ship. Lieutenant Frye had persisted to have the captain give the order in writing. The evidence produced against him at the court-martial were the depositions of a parcel of illiterate people, reduced into writing several days before he was brought to trial, which persons were entirely unknown to him, having never to his knowledge seen or heard their names before; and upon his objecting to the evidence, he was brow-beaten and overruled. On the charge being thus proved, he was sentenced to fifteen years' imprisonment, and rendered incapable of serving his Majesty. He was brought home, and his case, after being laid before the Privy Council, appearing in a justifiable light, his late Majesty was graciously pleased to remit the punishment, and to order him to be released.

Some time after he brought an action in the Court of Common Pleas against Sir Chaloner Ogle, who had sat as president at the court-martial, and had a verdict in his favour for 1000*l.* damages, it having been proved that he had been kept fourteen months in close confinement before he was brought to trial. The Judge, moreover, informed him, that he was at liberty to bring his action against any of the members of the said court-martial he could meet with. The subsequent steps of this case are still more remarkable.

Upon application made by Lieutenant Frye, Sir John Willes, Lord Chief Justice of the Common Pleas, issued his writ of capias against Rear-Admiral Mayne and Captain Rentone, two of the members who had sat at the above court-martial. On the 15th of May, 1746, while Admiral Mayne presided, and Captain Rentone sat as a member of a court-martial, at Deptford, for the trial of Vice-Admiral Lestock, they were both arrested, at the breaking up of the Court, in consequence of the above writ. The arresting of the president highly offended all the members of the Court: they met twice on the subject, and resented highly what they deemed an insult, and drew up certain resolutions, in which they expressed themselves with some degree of acrimony against the Lord Chief Justice; and the Judge-Advocate was directed to deliver them to the Board of Admiralty, in order to their being laid before the King. In these resolutions they demanded "satisfaction for the high insult on their president, from all persons how high soever in office, who have set on foot this arrest, or in any degree advised or promoted it;" and remonstrating that by the said arrest, "the order, discipline, and government of His Majesty's armies by sea was dissolved, and the statute 13 Charles 2. made null and void."

The Lords of the Admiralty were much displeased at the indignity offered to the Court, and accordingly laid the resolutions before His Majesty. The Duke of Newcastle, by His Majesty's command, wrote to the Lords Commissioners of the Admiralty, wherein he says, "His Majesty expressed great displeasure at the insult offered to the court-martial, by which the military discipline of the navy is so much affected; and the King highly disapproves of the behaviour of Lieutenant Frye on the occasion. His Majesty has it under consideration what steps may be advisable to be taken on this occasion."

From the sequel it will appear that the Lords Commissioners of the Admiralty, as well as the Secretary of State, were not aware of the very great authority of the Lord

Chief Justice of Common Pleas; who, as soon as he heard of the resolutions of the court-martial, caused each individual member to be taken into custody, and was proceeding in legal measures to assert and maintain the authority of his office, when a stop was put to the process by the following submission (signed by the president, and all the members of the court) being transmitted to Lord Chief Justice Willes: —

"As nothing is more becoming a gentleman than to acknowledge himself to be in the wrong, so soon as he is sensible that he is so, and to make satisfaction to any person he has injured; we therefore whose names are hereunder written, being thoroughly convinced that we were entirely mistaken in the opinion we had conceived of Lord Chief Justice Willes, think ourselves obliged in honour, as well as justice, to make him satisfaction as far as it is in our power. And, as the injury we did him was of a public nature, we do, in this public manner, declare, that we are now satisfied the reflections cast upon him in our resolutions of the 16th and 21st of May last, were unjust, unwarrantable, and without any foundation whatsoever; and we do ask pardon of his Lordship, and of the Court of Common Pleas, for the indignity offered both to him and the Court."

This paper was dated the 10th of November, 1746, was received in the Court of Common Pleas on the 14th, and ordered to be registered in the Remembrance Office, — a memorial, as the Lord Chief Justice then observed, "*to the present and future ages, that whosoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken.*" The letter from the court-martial, together with Judge Willes's acceptation, were inserted in the Gazette of the 15th November, 1746.*

* 1 M'Arthur, 436.

No. XVIII.

Form of Order to the second Officer in command to assemble a Court-Martial.

By Sir ——, Knight Commander of the Most Honourable Order of the Bath, Vice-Admiral of the Red, and Commander-in-Chief of Her Majesty's ships and vessels employed and to be employed in the Mediterranean.

Whereas, Captain C. D., commanding Her Majesty's ship "London," hath in his letter to me, dated the —— day of —— 18—, transmitted charges against —— of Her Majesty's ship ——, of the tenor following:—

1st Charge.

"For that he, the said —— being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ——, 18—, behave in a disrespectful and contemptuous manner to me (Captain ——), his superior officer, by stating on the quarter-deck of the said ship that I encouraged insubordination amongst the crew by not punishing them sufficiently, or words to that effect."

2nd Charge.

"For that he, the said —— being in actual service and ful pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ——, 18—, disobey the lawful order of and behave with contempt to me (Captain ——), his superior officer, by refusing to leave the quarter-deck when ordered by me to do so."

And whereas, I think fit that the said —— shall be tried by court-martial for the offences specified in those charges, I send you herewith the above mentioned letter of Captain C. D. and its enclosure, and do hereby require and direct you to assemble a court-martial on Saturday next, the —— day of ——, 18—, which Court, you being president thereof, is hereby required and directed to inquire into the circumstances of the offences with which the said —— stands charged, and to try him for the same accordingly.

Given under my hand on board the ——, at Malta, the —— day of ——, 18—.

(Signature of the commander-in-chief.)

To,

——, Esquire, Rear-Admiral of the Blue, and second officer in command of Her Majesty's ships and vessels at Malta.

By command of the commander-in-chief.

J. K., Secretary.

No. XIX.

Memorandum to the Officer directed to preside.

H. M. S. ——,
at ——,
—— 18—.

Memorandum.

Having directed you by my order of this day's date to preside at a court-martial to be held on board Her Majesty's ship —— on —— next, the —— instant, it is my direction that you cause the usual signal to be made at

eight o'clock A.M. on that day, and that the Court be assembled precisely at nine.

——— { Vice-Admiral and Commander-in-Chief.

Rear-Admiral ——
H. M. S. ——

No. XX.

General Memorandum to the Captains and Commanders to attend the Court.

H. M. S. ——,
at ——,
——— 18—.

General Memorandum.

The respective flag officers, captains and commanders of Her Majesty's ships and vessels at this port are to attend at a court-martial to be held on board Her Majesty's ship ——, on —— next, the —— instant.

The signal will be made at eight A.M., and the Court will sit precisely at nine

——— { Vice-Admiral and Commander-in-Chief.

To the respective flag officers, captains and commanders of Her Majesty's ships and vessels at ——.

No. XXI.

Order and Mode of Proceeding at a Naval Court-Martial.

1. The Court being opened, the parties to the trial, witnesses, and audience admitted, the president desires the Judge-Advocate to call over the names of the thirteen

senior flag officers and captains present to constitute a Court.

2. Judge-Advocate reads the warrant authorising the Court to assemble.

3. Officiating Judge-Advocate reads his warrant of appointment, which must be signed by the president.

4. Judge-Advocate administers the oath to the members, according to the form prescribed in the Act 10 & 11 Victoria, cap. 59.

5. President administers the oath to the Judge-Advocate according to the form prescribed in the Act 10 & 11 Victoria, cap. 59.

6. Judge-Advocate reads the charge or complaint against the person to be tried.

7. All the witnesses, except the one whom it is intended to examine first on the part of the prosecution, ordered to withdraw from the Court.

8. Witnesses summoned by the prosecutor in the order in which they will be examined,—

A. B.	E. F.
C. D.	G. H.

9. Method to be observed in the examination of witnesses for the prosecution,—

1st. To be questioned by the prosecutor.

2nd. By the Court, or Judge-Advocate.

3rd. By the party upon trial.

10. At the conclusion of the examination of the witnesses for the prosecution, the prosecutor informs the Court that he has nothing further to produce in support of the charges; the president then calls upon the prisoner to enter on his defence.

11. When the prisoner is ready with his defence, the prosecutor, witnesses, and audience are to be admitted, and the same must be read aloud by the prisoner, or, if he wish it, by the Judge-Advocate.

12. All the witnesses, except the one whom it is intended

to examine first on the part of the defence, ordered to withdraw from the Court.

13. Witnesses summoned by the prisoner in the order in which they will be examined,—

A. B.	E. F.
C. D.	G. H.

14. Method to be observed in the examination of witnesses for the defence,—

1st. To be questioned by the prisoner.
2ndly. By the Court or the Judge-Advocate.
3rdly. By the prosecutor.

15. When the defence is concluded, the prisoner must be removed, and the prosecutor and audience ordered to withdraw from the Court. The Judge-Advocate to be instructed to draw up such questions as may be agreed upon whereon to form a determination in regard to the innocence or guilt of the person upon trial: to collect the votes and opinions of the members whether the charges are *proved* or *not proved*, and if *proved* the nature of the punishment to be awarded; on these questions the junior member votes first, and so on in order up to the president. The Judge-Advocate to draw up the sentence under the direction of the Court, specifying therein the charge or substance of it, which must be signed by every member, notwithstanding any difference of opinion there may have been among them.

16. The Court to be re-opened, and all parties admitted, and the sentence to be read aloud by the Judge-Advocate (the members sitting with their cocked hats on), at the conclusion of which the president must declare the Court to be "dissolved."

17. The president to deliver or send the original sentence to the commander-in-chief.

18. The original minutes of the evidence and proceedings of the Court, or an attested copy of them, to be sent by the Judge-Advocate to the secretary of the Admiralty.

No. XXII.

Instructions usually given to the Officer of the Court.

"Actæon," at Ascension,
——— 18—

List of Witnesses.

A. B.
C. D.
E. F.

1. The witnesses who have been examined are not to communicate with the witnesses who have not been examined.

2. No witness is to be permitted to leave the ship without the permission of the Court.

3. When the Court is cleared to deliberate, no person is to be allowed abaft the mizen mast, on the quarter deck, or abaft the main mast on the main deck.

GEO. MANSEL,
President of the Court.

To

Lieutenant ———
Officer of the Court.

No. XXIII.

Form of Minutes of Proceedings at a Court-Martial.

Minutes of proceedings at a court-martial held on board Her Majesty's ship "Albion," at Malta, on Saturday, the —— day of January, 18—, and by adjournment every day afterwards (Sunday excepted) to Tuesday, the —— day of January, 18—.

Present.

——, Esquire, Rear-Admiral of the Blue Squadron and second officer in command of Her Majesty's ships and vessels at Malta, President.

——, Esquire, Commodore of the First Class, and First Captain of Her Majesty's ship "London."

Captains.

A. B., —— of H. M. S. "Rodney."
C. D., —— of H. M. S. "London."
E. F., —— of H. M. S. "Minden."
(Commodore Second Class.)
G. H., —— (Additional) of H. M. S. "Rodney."

Being all the flag-officers and captains of Her Majesty's ships and vessels at Malta, except

Sir ——, K. C. B., Vice-Admiral of the Red Squadron, and Commander-in-Chief of Her Majesty's ships and vessels employed, and to be employed, in the Mediterranean.

Captain ——, of H. M. S. "Victory" (senior to Captain A. B., of H. M. S. "Rodney"), who is absent on leave granted by the Lords Commissioners of the Admiralty.

Captain ——, of H. M. S. "Undaunted" (senior to Captain C. D., of H. M. S. "London"), the prosecutor.

Captain ——, of H. M. S. "Ocean" (senior to Commodore E. F., of H. M. S. "Minden"), who is detained with his ship in quarantine; and

Captain ——, of H. M. S. "Vestal" (senior to Captain G. H., of H. M. S. "Rodney"), who stated, in a letter to the President, his inability to attend through ill-health.

The prisoner, ——, of Her Majesty's ship ——, was brought into court, and the witnesses and audience admitted.

——, Captain of Her Majesty's ship "Undaunted," appeared in Court as prosecutor.

Read, the order of Sir ——, Knight Commander of the most Honourable Order of the Bath, Vice-Admiral of the Red Squadron, and Commander-in-Chief of Her Majesty's ships and vessels employed, and to be employed,

in the Mediterranean, addressed to the President ——, Esquire, Rear-Admiral of the Blue Squadron, and second officer in command of Her Majesty's ships and vessels at Malta, dated the —— day of ——, 18—, directing him to assemble a court-martial, and try ——, of Her Majesty's ship ——, on the following charges preferred against him by ——, Esquire, Captain of the said ships, viz.: —

First Charge.

"For that he, the said ——, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of —— 18—, behave in a disrespectful and contemptuous manner to me (Captain ——), his superior officer, by stating, on the quarter-deck of the said ship, that I encouraged insubordination amongst the crew by not punishing them sufficiently, or words to that effect."

Second Charge.

"For that he, the said ——, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ——, 18—, disobey the lawful order of, and behave with contempt to, me (Captain ——), his superior officer, by refusing to leave the quarter-deck when ordered by me to do so."

[*Here attach the order for the Court to assemble.*]

Read, the annexed letter, No. 1., from the said Captain —— to Vice-Admiral Sir ——, dated the —— day of ——, 18—, and its enclosure.

[*Here attach the letter of complaint, with the charges enclosed.*]

Read, the annexed letter, No. 2., from Vice-Admiral Sir ——, dated the —— day of ——, 18—, addressed to the President, as follows: —

"St. Vincent," at Malta,
———— 18—.

"Sir,

"With reference to my order to you of the ——, to assemble a court-martial for the trial of ——, therein named, I enclose, for your information, a list, according to seniority, of the captains and commanders now at this island.

"And with respect to Captain ——, of Her Majesty's ship 'Ocean,' who appears by that list to be in quarantine, I have to acquaint you that his Excellency the Governor has been pleased, on my application, to inform me that the Superintendent of Quarantine has been instructed either to attend in person or to send a proper officer of the Health Department in his stead, for the purpose of giving such evidence as the Court may require of his inability to attend.

I am, &c.,
A. B.,
Vice-Admiral."

"Rear-Admiral ——
&c. &c.

Read, the annexed letter, No. 3., from Captain ——, dated the —— day of ——, 18—, addressed to the President, certifying his inability to attend the Court through ill-health.

[*Here attach the letter.*]

Read, the annexed document, No. 4., from Vice-Admiral Sir ——, dated the —— day of ——, addressed to the President, certifying that Captain ——, of H. M. S. "Victory," is absent on leave granted by the Lords Commissioners of the Admiralty.

[*Here attach the Certificate.*]

Read, a warrant appointing Mr. J. K. to officiate as Judge-Advocate.

Then the members of the Court and the officiating Judge-Advocate, in open court, and before they proceeded to trial, respectively took the oaths directed by the Act of Parliament 10 & 11 Victoria, cap. 59., entitled "An Act for amending an Act, intituled An Act for amending, explaining, and reducing into one Act of Parliament, the laws relating to the Government of His Majesty's ships, vessels, and forces by sea."

All the witnesses, except the first to be sworn, then withdrew from the Court.

——, Superintendent of Quarantine at Malta, sworn and examined as follows:—

By the Court. ———— ?
Answer. ————

[*The witness withdrew.*]

——, Surgeon of H. M. S. "Vestal," sworn and examined as follows:—

By the Court. ———— ?
Answer. ————

[*The witness withdrew.*]

——, of H. M. S. ——, sworn and examined as follows:—

Prosecutor.—State to the Court, &c.
Answer. ————
By the Court. ———— ?
Answer. ————
By the prisoner. ———— ?
Answer. ————

[*The witness withdrew.*]

At four o'clock the Court adjourned until Monday morning at nine o'clock.

Second Day.

Monday, the —— of January, 18—, nine o'clock.

The Court, having re-assembled pursuant to adjournment, was opened, the prisoner brought in, the audience admitted, and the Court proceeded in the trial as follows:

——, of H. M. S. ——, sworn and examined as follows:—

Prosecutor. ———— ?

Answer. ————

[*The prisoner declined cross-examining this witness.*]

[*The witness withdrew.*]

The evidence in support of the charges being finished, the prisoner (who had been attended by his friend in Court during the examination) was called upon to make his defence, when he requested till —— morning for that purpose. The Court informed the prisoner that they would meet to-morrow morning at nine o'clock, and, if he was not then prepared, he might renew his application for an adjournment.

Court adjourned until to-morrow morning at nine o'clock.

Third Day.

Tuesday, the —— of January, 18— , nine o'clock.

The Court, having re-assembled pursuant to adjournment, was opened, the prisoner brought in, and the audience admitted.

The prisoner then read the annexed written defence* (No. ——).

[*Here attach the defence.*]

After reading the defence, the prisoner put in the annexed certificates, six in number, marked A. to F., which were read to the Court by the officiating Judge-Advocate as follows:—

[*Here attach the Certificates.*]

* The defence must be signed by the prisoner.

The prisoner then desired to call witnesses in his defence.

——, of H. M. S. ——, sworn and examined as follows:—

By the prisoner. ————————?
Answer. ————————
By the Court. ————————?
Answer. ————————
By the prosecutor. ————————?
Answer. ————————

[*The Witness withdrew.*]

The prisoner having nothing further to offer in his defence, the Court was cleared, and proceeded to deliberate upon and frame the sentence.

The Court having very maturely and deliberately weighed and considered the evidence in support of the charges, as well as what the prisoner had to offer in his defence, as also the evidence adduced in his behalf, was of opinion, that the first charge had been proved against the prisoner ——, and that the second charge had been in part proved. The Court did, therefore, as regards the said first charge, adjudge the said —— to be dismissed from Her Majesty's ship ——; and as regards the second charge, the Court was of opinion, that it had been proved that the prisoner had behaved with contempt to his superior officer; but that so much of the said second charge as relates to disobedience of orders had not been proved. The Court did, therefore, adjudge him to be severely reprimanded for such contempt to his superior officer, and acquitted of disobedience of orders.

The Court was re-opened, the prisoner brought in, the prosecutor, witnesses, and audience admitted, and the prisoner —— so, respectively, sentenced and acquitted accordingly. And it appearing to the Court that ——, of Her Majesty's ship ——, who was produced as a witness, did, in the course of his examination, prevaricate in his

evidence, the Court did, therefore, adjudge him, the said ——, to be imprisoned in one of Her Majesty's prisons in England, for the term of three months.

J. K.,
Officiating Judge-Advocate.

No. XXIV.

Form of Sentence.

At a court-martial assembled on board Her Majesty's ship "Albion," at Malta, on ——, the —— day of January, 18—, and by adjournment every day afterwards (Sunday excepted) to ——, the —— day of January, 18—.

Present.

——, Esquire, Rear-Admiral of the Blue Squadron, and second officer in command of Her Majesty's ships and vessels at Malta, — President.

——, Esquire, Commodore of the First Class, and First Captain of Her Majesty's ship "London."

Captains.

A. B., —— of H. M. S. "Rodney."
C. D., —— of H. M. S. "London."
E. F., —— of H. M. S. "Minden."
(Commodore of the Second Class).
G. H., —— (Additional) of H. M. S. "Rodney."
J. K., Officiating Judge-Advocate.

The Court, pursuant to an order from Sir ——, Knight Commander of the Most Honourable Order of the Bath, Vice-Admiral of the Red Squadron, and Commander-in-Chief of Her Majesty's ships and vessels employed, and to be employed, in the Mediterranean, dated the —— day of

——, 18—, directed to ——, Esquire, Rear-Admiral of the Blue Squadron, and Second Officer in Command of Her Majesty's ships and vessels at Malta, having been duly sworn according to Act of Parliament, proceeded to the trial of ——, —— of Her Majesty's ship ——, on the following charges exhibited against him by ——, Esquire, Captain of the said ship, viz.:—

First Charge.

"For that he, the said ——, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ——, 18—, behave in a disrespectful and contemptuous manner to me (Captain ——), his superior officer, by stating, on the quarter-deck of the said ship, that I encouraged insubordination amongst the crew, by not punishing them sufficiently, or words to that effect."

Second Charge.

"For that he, the said ——, being in actual service and full pay in the fleet, and —— of and belonging to Her Majesty's ship ——, did, on the —— day of ——, 18—, disobey the lawful order of, and behave with contempt to me (Captain ——), his superior officer, by refusing to leave the quarter-deck, when ordered by me to do so."

And having carefully and deliberately weighed and considered the evidence in support of the charges, as well as what the prisoner had to offer in his defence, as also the evidence adduced in his behalf, and having very maturely considered the whole, the Court is of opinion that the first charge is proved against the said ——; that so much of the second charge as relates to the prisoner having behaved with contempt to Captain ——, his superior officer, is also proved, and that the charge of disobedience of orders is not proved.

And the Court doth, therefore, adjudge the said —— to be dismissed from Her Majesty's ship ——, for the offences specified in the first charge; and as regards the second charge, to be severely reprimanded for having behaved with contempt to his superior officer, and acquitted of disobedience of orders.

And the said —— is hereby respectively adjudged to be dismissed from Her Majesty's ship ——, severely reprimanded, —and acquitted accordingly.

And it appearing to the Court that ——, of Her Majesty's ship ——, who was produced as a witness, did, in the course of his examination, prevaricate in his evidence, the Court doth hereby adjudge him the said —— to be imprisoned in one of Her Majesty's prisons in England for the term of three months.

(Signatures of the members.)

[*The senior member signs first, and so on in order down to the junior member.*]

J. K., Officiating Judge-Advocate.

Sentence of Death.

The Court doth, therefore, adjudge the said —— to be hanged by the neck at the yard-arm of such one of Her Majesty's ships or vessels, and at such time as the Commander-in-Chief shall direct.

Sentence of Corporal Punishment.

The Court doth therefore adjudge the said —— to receive ——, lashes on his bare back with a cat-of-nine-tails, alongside or on board of such of her Majesty's ships and vessels, at such time, and in such proportions, as the Commander-in-Chief shall direct.

No. XXV.

Proceedings at the Trial of the Officers and Crew of a Ship lost.

When the members of the court-martial are assembled, call over the names of the commander, officers, and company of the ship lost.

"(Attach the list to the minutes.)

Read the order for assembling the Court.

Swear the Court, &c.

Read the captain's narrative of the loss of the ship.

Swear the captain, and examine him as follows: —

By the Court. — Is the narrative just read to the Court a true statement of the circumstances of the stranding and wreck of Her Majesty's late ship —— ?

Answer. — Yes.

By the Court. — Have you any complaint to make against any of the surviving officers and ship's company of the said late ship on that occasion?

Answer. — None.

By the Court. — To the remaining officers and ship's company generally.

Have you or any of you any thing to object to the narrative just read to the Court, or any thing to lay to the charge of any officer or man with reference to their conduct on the occasion of the loss of Her Majesty's late ship —— ?

Answer. — None.

Read the deposition of —— ——, and ——, belonging to the late ship ——, who were prevented from attending in court on account of being ——, as follows: —

"The undersigned, formerly belonging to Her Majesty's late ship ——, voluntarily appeared before me, and made oath, that they have no complaint to make against

any of the surviving officers and ship's company, relating to the stranding and wreck of the said ship in —— Bay at ——.

" A. B., Lieutenant.
" C. D., Surgeon.

" Sworn and subscribed before me,
at ——, the —— day of ——, 18—.
—— ——, Magistrate."

Mr. —— ——, master of Her Majesty's late ship ——, sworn, and examined, as follows: —

(Proceed as in other trials.)

Form of Sentence on the Officers and Crew of a Ship lost.

At a court-martial assembled on board Her Majesty's ship ——, at ——, on the —— day of ——, 18—.

Present.

——, Esq., Captain of Her Majesty's ship ——, and second officer in command of Her Majesty's ships and vessels at ——, President.

Captains.

A. B., —— of H. M. S. ——
C. D., —— of H. M. S. ——
E. F., —— of H. M. S. ——
G. H., —— of H. M. S. ——
J. K., Officiating Judge-Advocate.

The Court, pursuant to an order from ——, dated ——, directed to ——, having been duly sworn according to Act of Parliament, proceeded to the trial of ——, Esq., captain of Her Majesty's late ship ——, together with the remaining officers and ship's company of the said late ship; on the following charge, namely, —

" For that he, the said ——, Esq., captain of Her Majesty's late ship ——, together with the remaining officers

and ship's company of the said late ship, on the —— day of ——, 18—, all of them being at that time in actual service and full pay in the fleet, did, through negligence, run upon the shore, in —— Bay, at ——, Her Majesty's said late ship, thereby causing the said ship to be wrecked and lost."

And having heard the narrative of the said captain —— of the circumstances relating thereto, and examined the remaining officers and ship's company, except (*here insert the names of those who did not attend the Court, and the reason of their being absent*), and having deliberately weighed and considered the said narrative, and the whole of the evidence brought forward, the Court is of opinion that no blame whatever attaches to captain ——, or any of the officers or ship's company of the said ship —— for their conduct and proceedings on the occasion of her loss, as it appears to the Court that all possible precautionary measures were adopted for her preservation, but which were rendered inefficient from the extreme violence of the gale and the tremendous sea; and the Court doth in consequence thereof adjudge the said captain ——, the remaining officers and ship's company of Her Majesty's late ship —— to be fully acquitted, and the said captain ——, officers, and ship's company, are hereby severally and respectively fully acquitted accordingly.

And the Court cannot separate without recording its approbation of the high state of discipline and good conduct maintained by the officers and ship's company throughout the whole of these trying circumstances, which have been marked by judgment and good seamanship alike honourable to all.*

(Signatures of the Members of the Court, and the Judge-Advocate.)

* (*Where negligence is proved.*)

And having heard the narrative of the said captain —— of the circumstances relating thereto, and examined the

remaining officers and ship's company, and having deliberately considered the said narrative, and the whole of the evidence brought forward, the Court is of opinion that Her Majesty's ship —— was stranded through the negligence of lieutenant ——, who was the officer in charge of the watch at the time, and omitted to cause the lead to be hove, and report to the captain that the land was in sight, the Court doth therefore adjudge the said —— to be dismissed from Her Majesty's service. And the Court is of opinion that no blame whatever attaches to captain ——, the other officers and ship's company, and doth therefore adjudge them to be acquitted.

And the said lieutenant —— is hereby sentenced to be dismissed from Her Majesty's service, and the said captain ——, the other officers and ship's company, to be acquitted accordingly.

(Signatures of the Members of the Court, and the Judge-Advocate.)

No. XXVI.

Officiating Judge-Advocate's Warrant.

By ——,
&c.

Whereas —— has directed me, by an order, dated ——, to assemble a court-martial, and try —— ——, belonging to Her Majesty's ship ——, for ——, and whereas by an Act passed in the 22d year of the reign of King George the Second, intituled, "An Act for amending, explaining, and reducing into one Act of Parliament the laws relating to the government of His Majesty's ships, vessels, and forces by sea," it is ordered, "That in the absence of the Judge-Advocate and his Deputy, the Court-martial

shall have full power and authority to appoint any person to execute the office of Judge-Advocate:"

I do, with the consent and approbation of the members who constitute this court, hereby authorise you to execute the office of Judge-Advocate on the above occasion, and for so doing this shall be your warrant.

Given, &c.

(Signature of the President.)

To

—— ——, Esq.

hereby appointed to execute the office of Judge-Advocate at the court-martial above-mentioned.

No. XXVII.

Provost Marshal's Warrant.

By ——,

&c.

Whereas I have ordered a court-martial to be assembled on board Her Majesty's ship ——, on —— morning next, the —— instant, to try —— ——, belonging to Her Majesty's ship ——, for ——, I do hereby authorise and appoint you to officiate as Provost Marshal on this occasion, and you are forthwith to take the person of the said —— into your custody, and him safely keep until he shall be delivered by due course of law. And for so doing this shall be your warrant.

Given on board the ——, at ——, the —— day of —— 18—.

(Signature of the Commander-in-Chief.)

To

Mr. —— ——,

hereby appointed Provost Marshal on the occasion.

By command of the Commander-in-Chief.

C. D., Secretary.

No. XXVIII.

Notice of Trial to the Prosecutor.

H. M. S. ——,
at ——,
—— 18—.

Sir,

The Commander-in-Chief having ordered ——, to assemble a court-martial on —— next, the —— instant, on board Her Majesty's ship ——, to try ——, of ——, on the charges exhibited against him, and enclosed in your letter of the —— instant; and it being intended that I shall officiate as Judge-Advocate upon the occasion, I have to request that you will be pleased to furnish me with a list of the witnesses you wish to call in support of the charges, in order that they may be duly summoned to attend the Court.

I am, &c.
C. D.,
Officiating Judge-Advocate.

To
Captain ——,
H. M. S. ——.

No. XXIX.

Notice of Trial to the Prisoner.

H. M. S. ——,
at ——,
—— 18—.

Sir,

The Commander-in-Chief having directed a court-martial to assemble on board Her Majesty's ship —— on ——

next, the —— instant, and try you on certain charges exhibited against you by —— which he enclosed in a letter to Vice-Admiral —— dated ——;

In acquainting you therewith, I transmit for your information copies of the charges and letter referred to, and request you will furnish me with the names of such persons as you may be desirous of calling as witnesses in your behalf, in order that they may be duly summoned to attend the Court.

I am, &c.

C. D.,
Officiating Judge-Advocate.

Lieutenant ——,
H. M. S. ——.

No. XXX.

Summons to Witnesses.

H. M. S. ——,
at ——,
—— 18—.

Memorandum.

You are desired to attend a court-martial, ordered to be held on board Her Majesty's ship ——, on —— morning next, the —— instant, at 9 o'clock precisely, for the trial of —— ——, on charges exhibited against him by ——, of disobedience of orders, and contempt to his superior officer, on the —— of —— last, in order to give your evidence thereon.

C. D.,
Officiating Judge-Advocate.

To
Lieut. ——
Mr. ——
,, ——
} H. M. S. ——

No. XXXI.

Warrant to the Captain of the Ship to which the Prisoner belongs for carrying the Sentence of Death into Execution.

L.S.

By,——
&c.

Whereas at a court-martial held on board Her Majesty's ship ——, at ——, on the —— instant, —— being president thereof, a sentence was passed to the effect following; viz. "The Court, in pursuance of an order from," &c. (*here insert the sentence.*)

And whereas upon receiving the said sentence, and the minutes of the court-martial, I have thought fit to approve the same: by virtue of the power and authority in me vested, you are hereby required and directed to see the said sentence carried into execution on —— next, the —— instant, or the first favourable day afterwards (Sunday excepted), between the hours of 8 and 11 o'clock in the forenoon, by causing the said —— to be hanged by the neck at the fore-yard arm of Her Majesty's ship ——, under your command, until he is dead, accordingly; and for so doing this shall be your warrant.

Given under my hand and seal on board Her Majesty's ship ——,
at ——,
the —— day of —— 18—.

(Signature of the Commander-in-Chief.)

To

——, Esquire,
Captain of Her Majesty's ship ——.

By command of the Commander-in-Chief.

C. D., Secretary.

No. XXXII.

Order to the Provost Marshal to attend at the Execution of the Sentence.

By ——,
&c.

Having ordered the sentence of the court-martial on ——, the prisoner in your charge, to be put in execution on —— next, the —— instant, or the first favourable day afterwards (Sunday excepted):

You are hereby required and directed to attend with him on board Her Majesty's ship —— for that purpose, whenever the signal shall be made, and follow such orders as you may receive from Captain —— for your guidance in this matter.

Given &c.
(Signature of the Commander-in-Chief.)

To
Mr. ——,
Provost-Marshal.

By command, &c.
C. D., Secretary.

No. XXXIII.

Order to the Captain of the Ship to which the Prisoner belongs to make the Signal for the Boats of the Squadron to attend at the Execution.

By ——,
&c.

You will receive herewith a warrant for carrying into execution the sentence of death passed by a court-martial

on —— —— of Her Majesty's ship ——, and having ordered a lieutenant with a boat manned and armed to be sent from each of Her Majesty's ships and vessels at this anchorage to attend and assist in carrying the same into execution, when the signal shall be made on board the ——, you are hereby required and directed to make the proper signal at —— o'clock in the morning of —— next, the —— instant, and to order the lieutenants in command of the boats to send some men out of each to assist in the execution of the sentence.

Given, &c.

(Signature of the Commander-in-Chief.)

To

——, Esquire,
Captain of Her Majesty's Ship ——.

By command, &c.
C. D., Secretary.

No. XXXIV.

General Memorandum to the respective Commanding Officers to send Boats manned and armed to attend at the Execution.

H. M. S. ——,
at ——,
—— 18—

General Memorandum.

Having ordered the sentence of death, passed by a court-martial, held on the —— instant, on —— ——, of Her Majesty's ship ——, for ——, to be carried into execution on —— next, the —— instant, between the hours of 8 and 11 o'clock in the forenoon, it is my direction that you send a lieutenant in a boat, manned and

armed, from the ship or vessel you respectively command, to Her Majesty's ship ——, as soon as the signal shall be made from that ship, in order to assist at and attend the said execution.

—— Vice-Admiral and Commander-in-Chief.

To

The respective Captains, Commanders, and Commanding Officers of Her Majesty's ships and vessels at ——.

No. XXXV.

Memorandum to be sent to each Captain on the Occasion of a Sentence of Death being carried into Execution.

H. M. S. ——,
at ——,
——18—.

Memorandum.

Having approved of the sentence of death, passed by a court-martial on —— —— of Her Majesty's ship ——, I transmit to you herewith a copy of the said sentence, together with my order for carrying the same into execution, both of which, as well as the articles of war, I desire you will read publicly on the quarter-deck to your officers and ship's company on —— next, the —— instant, at —— o'clock in the morning.

You are to be present, and remain on board your ship during the time of execution, and on the signal being made from the ——, you are to assemble the officers on deck, and cause the ship's company to man the rigging.

—— Vice-Admiral and Commander-in-Chief.

To

Captain ——,
H. M. S. ——.

No. XXXVI.

Order to the Captain of the Ship to which the Prisoner belongs to carry the Sentence of Corporal Punishment into Execution.

By ——,
&c.

Whereas, at a court-martial held on board Her Majesty's ship ——, at ——, on the —— instant, —— being president thereof, a sentence was passed to the effect following, — viz.: "The Court, in pursuance of an order from, &c. (*here insert the sentence.*)

And whereas I have thought fit to approve the same, and do hereby require and direct you, when the signal is made to that effect, on board the ——, on —— morning next, the —— instant, at —— o'clock, or the first favourable day afterwards (Sunday excepted) to cause a lieutenant of Her Majesty's ship under your command, to attend and see the sentence put into execution, by the said —— receving —— lashes on his bare back with a cat-of-nine-tails, alongside the ——; and you will herewith receive a copy of the sentence which is to be publicly read by the Provost Marshal alongside that ship. You will order the surgeon of the ship you command to attend in the boat with the lieutenant, and one of the assistant surgeons in the boat with the prisoner, and you will direct the lieutenant to stop the punishment till further orders, whenever the surgeon shall give it as his opinion that the prisoner cannot bear more with safety.

Given under my hand, on board Her Majesty's ship ——, at ——, the —— day of ——, 18—.

(Signature of the Commander-in-Chief.)

To

——, Esq.
Captain of H. M .S. ——.

By command of the Commander-in-Chief.

C. D., Secretary.

No. XXXVII.

Order to the Captain of the Flag Ship to cause the Signal to be made for the Boats of the Squadron to attend at the Execution of the Sentence of Corporal Punishment.

By ——,

&c.

Whereas —— ——, of Her Majesty's ship ——, has been sentenced by a court-martial to receive —— lashes on his bare back with a cat-of-nine-tails alongside, or on board such of Her Majesty's ships and vessels at this port, at such time or times and in such proportions as I shall direct:

You are hereby required and directed to cause the proper signal to be made from the ship bearing my flag, at —— o'clock in the morning of —— next, the —— instant, or the first favourable day afterwards (Sunday excepted), for the boats of the squadron, manned and armed, to assemble alongside Her Majesty's ship ——, to attend the said punishment.

Given under my hand, &c.

(Signature of the Commander-in-Chief.)

To

——, Esq.

Captain of H. M. S. ——.

By command of the Commander-in-Chief.

C. D., Secretary.

The order to the Provost Marshal to attend at the corporal punishment of the prisoner. The General Memorandum to the respective captains, to send boats manned and armed; and the Memorandum to be sent to

each captain on the occasion of a sentence of corporal punishment being carried into execution may be framed from the forms given, Nos. 32. 34. and 35.

No. XXXVIII.

Form of Warrant to be issued by the Commander-in-chief to empower the Commander of a Squadron ordered on separate Service to hold Courts-Martial.

By ———, Vice-Admiral of the Red, and commander-in-chief of Her Majesty's ships and vessels employed and to be employed in the Mediterranean, &c., &c., &c.

Whereas I have thought fit to detach a part of the fleet under my command to be employed under your orders, I do, by virtue of the power and authority vested in me by the 8th section of the Act 22 Geo. 2. cap. 33., for the better maintaining a proper government and strict discipline in the ships so detached, hereby authorise and empower you to call and assemble courts-martial as often as you shall see occasion, until you shall rejoin my flag, or come under the command of any other your superior officer, or return to Great Britain or Ireland. And, in order that the Crown may not be put to an unnecessary expense, and the officers and companies to great inconvenience by being kept out of their wages, on the occasion of the loss of any of Her Majesty's ships or vessels, you are, in case of such accident, to cause a court-martial to be assembled as soon afterwards as possible to try the respective officers and companies for the same. But you are most strictly charged and enjoined not to permit or suffer any lieutenant acting as commander of any ship or vessel,

to assist at, or compose a part of, such courts-martial, the judges of England having upon a question referred to them by His Majesty's order in council of the 2nd of September, 1791, given it as their opinion that persons so situated are not commanders within the meaning of the Act 22 Geo. 2. cap. 33.

Given under my hand on board the ——, at ——, the —— day of ——, 18—.

(Signature of the Commander-in-Chief.)

To

———————

———————

By command of the Commander-in-chief.

——, Secretary.

No. XXXIX.

Memorandum to accompany the preceding Warrant.

—— at ———

——— 18—.

Memorandum.

It being enacted by the 7th section of the Act of Parliament 22 Geo. 2. cap. 33., that no commander-in-chief of any fleet or squadron of His Majesty's ships, or detachment thereof, consisting of more than five ships, shall preside at any court-martial in foreign parts, but that the officer next in command to the commander-in-chief shall hold such court-martial, and preside thereat, it is my direction that, so long as there may be a sufficient number of officers under your orders qualified to sit at and form a court-martial (either actually present, or separated from

you by accident or otherwise) you do not preside at any such Court assembled by your authority.

——— { Vice-Admiral and Commander-in-Chief.

To

———

———

———

No. XL.

Certificate to be given by the President of the Court to the officiating Judge-Advocate.

This is to certify that Mr. —— officiated as Judge-Advocate at a court-martial at which I presided, assembled on board Her Majesty's ship —— at ——, on the —— day of —— 18—, for the trial of —— ——, of Her Majesty's ship ——, for disobedience of orders, on which trial the Court sat —— days.

Given under my hand, &c.

A. B. { Captain H. M. S. ——.

———

No. XLI.

Certificate to be given by the President of the Court to the Provost Marshal.

This is to certify that —— officiated as Provost Marshal at a court-martial at which I presided, assembled

on board Her Majesty's ship ——, at ——, on the —— day of ——, 18—, for the trial of —— ——, of Her Majesty's ship ——, for disobedience of orders, on which trial the Court sat —— days; and that he had the said —— as a prisoner in his charge —— days, exclusive of the days on which the Court sat.

Given under my hand, &c.

A. B. { Captain H. M. S. ——.

INDEX.

A.

ABATEMENT,
plea in, 121.
ABSTRACT OF COURTS-MARTIAL, from 1829 to 1848, 210.
ACCESSORIES,
and principals in general, 106.
how to be indicted, 107.
before the fact, 116.
after the fact, 118.
ACCESSORY,
acquittal as, no bar to an indictment as principal, 123.
ACCOMPLICE,
a competent witness, 53.
ACQUITTAL,
of one of several persons tried on the same charge, 66.
former, plea on account of, 121.
before an incompetent court no bar to a subsequent trial, 123.
ACQUITTED,
when the charges are proved, prisoner cannot be, 145.
ACTS,
every man responsible for the consequence of his, 48.
ACTS OF PARLIAMENT,
relating to the discipline of the navy, 4.
printed by the Queen's printer, 51.
ACT 22 Geo. 2. cap. 33.,
why the jurisdiction thereof should be extended, 88.
ADJOURNMENT,
of the court over one day illegal, 26.
ADMIRALS,
must have their flags flying at the port when the court-martial is assembled, 21.

ADMIRALTY,
jurisdiction of the, 87.
may refuse to order a court-martial, 165. See also title, *Courts-Martial.*
ADMISSIONS,
written documents, signed by the prisoner, to be considered, 50. See also title, *Confessions.*
AFFIDAVITS,
should not be received in evidence, 72.
AMERICA, NORTH,
men employed on the lakes in, amenable to courts-martial, 95.
ANSELL, FRANCIS,
case of, 102.
ARREST,
persons released from may be tried at any subsequent period, 97.
commanding officers authorized to place offenders under, 162.
should not be unnecessarily severe, 163.
ARTICLES OF WAR,
crimes specified in the, 85.
printed by the Queen's printer, evidence of such articles, 51.

B.

BENNETT, CAPTAIN,
case of, 145.
BUGGERY,
punishment to be inflicted for, 142.
remarks respecting the crime of, 202.

C.

CAPTAIN. See title, *Courts-Martial.*
of the fleet, position to be occupied by, at courts-martial, 23. Appendix, v.
CERTIFICATES,
used by the prisoner in his defence, 73.
CHARGE OR CHARGES,
must be made in writing, 29.
must be made within a certain period after the offence, &c., *ib.* Appendix, xii. and xiii.
prisoner to be supplied with a copy of the, 30.
to be read aloud by the judge-advocate, 31.
prisoner not to be called upon to plead to the, 42.

CHARGE, OR CHARGES — *continued.*
when found to be frivolous, &c., 154.
observations on the framing of the, 168.
to specify some particular act or omission which constitutes a crime, *ib.*
in case of loss of ship, 169.
names inserted in, to be written in full, *ib.*
must be certain as to party injured, *ib.*
dates mentioned in, to be written in words, 170.
place and time, when material, to be stated in, &c., *ib.*
when the offence is proved to have been committed on a different date to that laid in the, 122. 171.
when founded on written documents, 171.
article of war violated need not be stated in the, 172.
only one offence to be inserted in one, *ib.*
where particular words are used in the articles of war in reference to the crime which forms the subject of the, *ib.*
several persons may be included in the same, *ib.*
form of, 173.
CIVILIANS,
cannot be forced to attend as witnesses, 78.
when summoned, to have their expenses tendered to them, 80.
COMMANDER. See title, *Courts-Martial.*
COMMANDER-IN-CHIEF,
when to preside at courts-martial in foreign parts, 8.
when not to preside at courts-martial, 7.
may peruse the minutes of courts-martial, 158.
may not pardon offenders sentenced by courts-martial, or remit punishments, 159.
may suspend the execution of the sentence, *ib.*
may refuse to order a courts-martial, 165.
See also title, *Courts-Martial.*
COMMANDING OFFICER,
not authorized to punish men for capital crimes, 125.
COMMODORES, FIRST CLASS,
position to be occupied by, at courts-martial, 23. Appendix, v.
CONFESSIONS,
evidence of, how to be received, 43.
cannot affect any but the party who made them, 45.
made by party when drunk, *ib.*
evidence of, should be cautiously received, *ib.*
made to prisoner's legal adviser, 46.
need not be made on oath, *ib.*
See also title, *Admissions.*
CONVICTION,
former, plea on account of, 123.

CONVOY,
neglecting to fight in defence of, 181.
COPIES OF DOCUMENTS,
when and how to be received in evidence, 37.
COPY OF SENTENCE, &c.
not to be furnished by the judge-advocate, 138.
CORONER,
jurisdiction of, 103. Appendix, xvi.
COUNSEL,
when employed by the prosecutor or prisoner, 74.
COURT OR COURTS-MARTIAL,
constitution of, 5.
authority to be given to commanders-in-chief to hold, 6.
when the commander-in-chief is not to preside at, 7.
when the commander-in-chief may preside at, 8.
senior officer of detached squadrons to be empowered to hold, 9.
form of warrant to senior officers authorizing them to hold, Appendix, xxxviii.
when it may be improper for the second officer in command to preside at, 13. 15.
Admiralty to appoint officers at the home ports to hold, 13.
not to consist of fewer than five, or more than thirteen members, 14. 18.
number of members not to be directed or ascertained, 14.
when commanders may sit as members of, 14. 18. Appendix, vi.
to consist of the senior officers of the fleet, 15.
on objections being raised to particular officers sitting as members of, *ib.*
members of, may give evidence, 17.
neither the prosecutor nor the prisoner can be members of the, 18.
proceedings of, illegal, if more than two commanders sit as members of, 18. Appendix, vi.
commanders acting as captains can sit only according to their seniority as commanders, 19.
captains promoted to be flag-officers to take rank as such at, *ib.*
commanders promoted to be captains to take rank as such at, *ib.*
commanders and lieutenants promoted abroad, until confirmed by the Admiralty, not eligible as members of, *ib.* Appendix, iv. and vi.
lieutenants acting as captains of rated ships, eligible as commanders at, 20.
when two captains are borne on the books of a ship, both are eligible as members of, *ib.*

COURT OR COURTS-MARTIAL — *continued.*
captains, &c., on half-pay, or doing duty as secretaries, not eligible as members of, 20.
admirals must have their flags flying at the port, to be eligible as members of, 21.
captains must be present at the port with their ships, to be eligible as members of, *ib.*
captains of ships lost not eligible as members of, 22. Appendix, vii.
captains of the fleet, and commodores of the first class, position to be occupied by, at, 23. Appendix, v.
may dispense with the attendance of members in case of sickness, &c., 23. 26. Appendix, i. and iii.
every flag-officer and captain in sight to attend at, 24.
captains under sailing orders to attend at, 25.
may be held in the presence of senior officers detained in quarantine, *ib.* Appendix, x.
may be held in the presence of senior officers arriving after the court is sworn, 25.
appointment of officiating judge-advocate at, 25. 132. Appendix, xxvi.
usual hour for assembling, 25.
not to be adjourned over one day, 26.
members of, to take their seats according to seniority, *ib.*
position to be occupied by the prosecutor, prisoner, and witness at, *ib.*
order for the assembling of the court to be read, 27.
warrant of the officiating judge advocate to be read, *ib.*
oath to be administered to the members and officiating judge-advocate, *ib.*
may be held on board any ship in commission, *ib.*
on Admiral Keppel was held on shore, *ib.*
not to be discharged from giving their judgment, *ib.*
crimes cognizable by, 81.
persons not amenable to, for crimes committed after being discharged from the service, 91.
invalids amenable to, *ib.*
officers and men taking passage in, or borne for wages and victuals, or for disposal, or lent to do duty in H. M's. ships, amenable to, *ib.*
on officers and men in hired vessels, 92.
may try subjects of any other nation who voluntarily enter the service, 94.
pressed men, when subject to, 95.
officers and men on the lakes in North America amenable to, 95.
a second can be held before the sentence of the first is carried into execution, *ib.*

COURT OR COURTS-MARTIAL — *continued.*
may try officers on half-pay, or persons who have quitted the service, for crimes committed by them when serving, 96.
peers of the realm may be tried by, 97.
members of parliament may be tried by, *ib.*
marines, when borne on the books of H. M's. ships, may be tried by, 98.
in what cases murder and manslaughter are cognizable by, 99.
charge may be corrected by direction of the, 121.
proceedings at, when all the evidence has been heard, 139.
all the members of the, to sign the sentence, 140.
order in which the members are to vote at, *ib.*
when deliberating on any question, bystanders to withdraw, *ib.*
cases where no discretion as to punishment is left to the, 141.
members of, absenting themselves, to be cashiered, 142.
not to sentence an officer to be reduced to an inferior rank, 143.
can only *recommend* that officers dismissed should receive half-pay, 147.
to inquire into the subject of the charge, and to that only, 149.
has no power to dispose of the bodies of criminals after execution, 150.
cannot sentence an offender to be *transported, imprisoned with hard labour*, or kept in *solitary confinement*, 151. Appendix, xv.
to state the grounds on which they recommend a prisoner to mercy, 152.
minority at, may vote on the question of punishment, 154.
Admiralty or commander-in-chief may refuse to order a, 165.
order for assembling a, Appendix, ii. and xviii.
memorandum to officer directed to preside at, Appendix, xix.
to captains, to attend, Appendix, xx.
lieutenants acting as commanders not eligible as members of courts-martial, Appendix, iv.
date of order for, not material, Appendix, xiv.
consequences resulting from illegal proceedings at, Appendix, xvii.
order and mode of proceeding at, Appendix, xxi. xxv.
instructions for the officer of the court, Appendix, xxii.
form of minutes of proceedings at, Appendix, xxiii.
CRIMES,
specified in the articles of war, 85.
committed on shore by persons in the fleet, 87.

CROSS EXAMINATION,
of witness. See title, *Witness.*

D.

DATE,
mentioned in the charge, when not material, 122.
DEATH,
sentence of, 154. Appendix, xxiv. and xxxi.
provost marshal to attend at the execution of the, Appendix, xxxii.
boats manned and armed to attend at the execution of the, Appendix, xxxiv.
memorandum to be sent to each captain with, Appendix, xxxv.
execution of the sentence of, in cases of mutiny, 160.
DEFENCE,
prisoner allowed a reasonable time to prepare his, 74.
if written, must be read by the prisoner or the judge-advocate, *ib.*
DESERT,
to the enemy, endeavouring to, Appendix, xi.
DESERTERS,
commanding officers receiving, 142.
DESERTION,
when employed on shore, 87.
remarks on the crime of, 179.
DRUNK,
confessions made by party when, 45.
DRUNKENNESS,
no excuse for crime, 130.
DUELLING, 115. 194. See also title, *Murder.*
DYING DECLARATIONS, 45. 56.

E.

EVIDENCE,
a member of the court may give, 17.
always to be given on oath, 31.
Jews and infidels may give, 33.
in what cases it may be rejected, *ib.*
may be given by Quakers on affirmation, *ib.*
where it has been improperly received, 35.
the best to be produced, 37.
copies of documents how and when to be received in, *ib.*
prosecutor may give, 38. 77. Appendix, iii.
postponement of trial on the ground of want of, 41.
of confessions, how to be received in, 43. 45.

EVIDENCE — *continued.*
presumptive, 47.
Sir Mathew Hale on, 49.
written, 37. 50. 56.
written, must always be produced, where it can be had, 50. 52.
written, mode of examining witness on the production of, 50.
acts of parliament received as, 51.
articles of war received as, *ib.*
written, prosecutor and prisoner may call upon each other to produce, *ib.*
parol, 52.
must be of matter within the personal knowledge of the witness, *ib.*
in matters of science, *ib.*
idiots and lunatics not allowed to give, *ib.*
persons deaf and dumb may give, *ib.*
infants, provided they understand the obligations of an oath, may give, 53. 55.
accomplice may give, 53. 54.
of husband and wife, 55.
witness not bound to criminate himself in, *ib.*
or to make disclosures prejudicial to public interests, *ib.*
hearsay, when to be received, 56.
dying declarations received in, 45. 56.
of seditious speeches, 58.
of seamen against their officers, 65.
where it does not affect one of several persons tried on the same charge, 66.
affidavits should not be received in, 72.
as to character, 73.
refusing to give, 78.
when civilians are required to give, 78. 80.
when prisoners of war are required to give, 80.
when persons who are confined in any gaol are required to give, *ib.*
EXAMINATION OF WITNESSES. See title, *Witness.*

F.

FELONIES, 107.
FOREIGNERS,
who voluntarily enter the service, amenable to courts-martial, 94.
FOTHELL, LIEUTENANT, R.M.,
case of, 16.
FRANKLIN, LIEUTENANT,
case of, 144.

G.

GAMAGE, LIEUTENANT,
tried for stabbing a Serjeant of Marines, 198.

H.

HALF PAY,
officers on, not eligible as members of courts-martial, 20.
officers on, may be tried for crimes committed when in actual service, 96.
officers dismissed cannot receive, 147.
HALL, WILLIAM,
case of, 95.
HARD LABOUR,
court-martial cannot adjudge a prisoner to, 151. Appendix, xv.
HARRIS, CAPTAIN,
case of, 26.
HEARSAY. See title, *Evidence.*
HIRED VESSELS,
officers and men employed in, 92.
HOMICIDE,
justifiable and excusable, 197. See also title, *Murder.*

I.

IDIOTS,
not to be allowed to give evidence, 52.
INDICTMENT. See title, *Charges.*
INFANTS (*i.e.* persons under twenty-one years of age),
not eligible as members of courts-martial, 16.
may give evidence, 53. 55.
IMPRISONMENT,
where sentences of are to be carried out, 151.
INSANE DELUSIONS,
law respecting crimes committed by persons afflicted with, 126.
INSANITY,
crimes committed by persons when labouring under, 116.
INSTRUCTIONS
issued to Sir John Mennds in 1661, 3.
INVALIDS,
amenable to courts-martial, 91.

J.

JOHNSON, WILLIAM,
case of, 152.

JOHNSTONE, COMMODORE, and CAPTAIN SUTTON,
case of, 11.
JONES, LIEUTENANT,
case of, 38.
JUDGE-ADVOCATE,
appointment of, 25. 132.
warrant of, to be read, 27.
to administer oath to members, *ib.*
to take the prescribed oath, *ib.*
to read the order for the Court to assemble, *ib.*
general duties of, 133.
when conducting a prosecution, 136.
may give his opinion on matters of legal doubt, 137.
may not bias the Court in their verdict, *ib.*
may not furnish any person with a copy of the sentence, &c., 138.
to pronounce the sentence, 141.
form of warrant for. Appendix, xxvi.
form of certificate to. Appendix, xl.
JURISDICTION,
of the Admiralty, 87.
plea to the, 120.

K.

KILLING,
to be considered murder until accident or necessity be proved, 48. See also title, *Murder.*
KING, DANIEL,
case of, 83.

L.

LETTERS, ETC.,
used by the prisoner in his defence, 73.
LIEUTENANTS,
promoted abroad, not eligible as members of courts martial until confirmed by the Admiralty, 19.
acting as captains of rated ships, eligible as commanders at courts-martial, 20.
acting as commanders, not eligible as members of courts-martial. Appendix, iv.
LUNATICS,
not to be allowed to give evidence, 52.

M.

Mc MARRAN,
corporal, tried for mutiny, 186.
MAD,
persons becoming, after trial, 131.

MAHONY, TIMOTHY,
case of, 183.
MANSLAUGHTER,
persons acquitted of, cannot be indicted for murder, 123.
definition of, 208. See also title, *Murder*, and remarks from page 189 to page 201.
MARINES,
when borne on the books of H. M's. ships, 98.
when landed to do duty on shore, *ib.*
may be sent to head quarters for trial, *ib.*
MAXWELL, WILLIAM,
case of, 123.
MEDICAL MEN,
evidence of, in cases of supposed insanity, 127.
MEMBERS OF PARLIAMENT,
when amenable to courts-martial, 97.
MERCHANDIZE,
not to be received on board H. M's. ships, 142.
MERCY,
recommendation to, 152.
MINUTES OF PROCEEDINGS,
extracts from, not to be supplied, 138.
may be perused by the Commander-in-Chief, 158.
form of. Appendix, xxiii.
MISDEMEANORS, 107.
MISNOMER,
plea in abatement by reason of, 121.
MURDER OR MANSLAUGHTER,
upon the sea, 99.
in what cases court-martial competent to try, *ib.*
MURDER,
persons charged with, may be convicted of manslaughter, 123.
punishment to be inflicted for, 142.
definition of, by Lord Coke, 189.
Mr. Justice Coleridge summing up to the jury, in the case of Reg. *v.* Kirham, 189.
case of Reg. *v.* Smith, 194.
every person present at the transaction to be called upon to give evidence, 194.
by duelling, *ib.*
of officers of Justice, 197.
trial of Lieutenant Gamage for, 198.
MUSPRATT, WILLIAM,
case of, 66.
MUSTERS,
false, making or signing, 142

MUTINY,
by persons in the fleet when on shore, 87.
remarks on the crime of, 184.

N.

NAVY,
government of the, in former times, 1.
NORWAY, CAPTAIN,
case of, 142.

O.

OATH,
to be administered to witness, 31.
form of, may vary, *ib.*
is binding on the party to whom it is administered, 32.
to be administered to the members of the Court, and the Judge-Advocate, 27.
OBJECTIONS,
to members at courts-martial, 15. 18.
OFFENDERS,
how tried in former times, 2.
OFFICERS,
scandalous conduct on the part of, how to be punished, 142.
of the civil branches under the protection of the 19th and 22nd Articles of War, 182.
when deemed in the execution of their office, *ib.*

P.

PARDON,
cannot be granted by Commander-in-Chief, 159.
conditional, granted by Her Majesty, 161.
plea of, in bar of trial, 124.
PAROL EVIDENCE. See title, *Evidence.*
PASSENGERS,
in the Queen's ships not amenable to courts-martial for crimes committed after being discharged from the service, 91.
PEERS OF THE REALM.
when amenable to courts-martial, 97.
PERIOD,
within which complaint must be made in writing, 29. Appendix, xii. and xiii.
PERJURY,
punishment for, 79.
PERSONS,
not in the navy, not amenable to courts-martial, unless found to be spies, 82.

PHILLIPS, R.
case of, 103.
PLEAS, 120.
PLEA,
to the jurisdiction, 120.
in abatement, 121.
former acquittal, *ib.*
former conviction, 123.
pardon, 124.
having been punished for the offence, 125.
POWELSON, A.
case of, 152.
PRESSED MEN,
when subject to courts-martial, 95.
PRESUMPTIONS. See title, *Evidence.*
PREVARICATING,
in evidence, punishment for, 78.
PRINCIPAL AND ACCESSORY,
offences of, different in consideration of law, 119. 123.
PRINCIPAL,
acquittal as, no bar to a subsequent indictment as accesory, 123.
PRINCIPALS AND ACCESSORIES,
in general, 106.
PRINCIPALS,
in the first degre, 112.
in the second degree, 113.
PRISONER,
cannot be a member of the court-martial, 18.
to be supplied with a copy of the charges, 30.
but not with the written evidence against him, 31.
position to be occupied by, at court-martials, 26.
deemed to be innocent until the contrary be proved, 48.
doubtful points to be construed in favour of the, 140.
not to be called upon to plead to the charges, 42.
when called upon for his defence, 74.
may address the court after examining his witnesses, 76.
released from arrest, may be tried at any subsequent period, 97.
cannot be acquitted when the charges are legally proved, 145.
notice of trial to the. Appendix, xxix.
PRISONERS OF WAR,
when required as witnesses, 80.
should not be allowed to enter the service, 94.
PRISONERS,
confined in gaol, when required as witnesses, 80.

PRIZE SHIPS,
papers found on board, 141.
effects not to be taken out of, *ib.*
PROSECUTING,
task of, generally devolves on the captain, 77.
PROSECUTION,
when conducted by the Judge-Advocate, 136.
PROSECUTOR,
cannot be a member of the court-martial, 18.
position to be occupied by, at courts-martial, 26.
bound to produce the best evidence, 37.
need not retire from the court after giving evidence, 38. 77. Appendix, iii.
and prisoner may call on each other to produce written documents, 51.
not generally allowed to address the court on the matter in issue, 59.
notice of trial to the. Appendix, xxviii.
PROVOST-MARSHAL,
appointment and duties of, 166.
form of warrant. Appendix, xxvii.
certificate for pay. Appendix, xli.
to attend at the execution of the sentence of death. Appendix, xxxii.
PUNISHMENT,
cases where the court-martial have no authority to mitigate or extend the, 141.
See also, *Abstract*, &c., page 210.

Q

QUAKERS,
may give evidence on affirmation, 33.
QUARANTINE,
courts-martial may be held in presence of senior officer in, 25. Appendix, x.

R.

ROBBERY,
remarks respecting the crime of, 204.

S.

SAILING ORDERS,
captains under, not to be excused from attending courts-martial, 25.
SEAMEN,
evidence given by, 65.

SECRETARIES.
captains and commanders doing duty as, not eligible as members of court-martial, 20.
SENIOR OFFICER,
arriving after the court is sworn, 25.
SENTENCE,
copy of not to be given, 138.
to be drawn up by the judge-advocate, 140.
charges to be inserted in the, *ib.*
to be signed by every member of the court, *ib.*
to be pronounced by the judge-advocate, 141,
must be in conformity with the Articles of War, *ib.*
not to direct an officer to be reduced to an inferior rank, 143.
to express of what the accused has been found guilty, 148.
to be confined solely to the charges, 149.
great care to be observed in drawing up the, 150.
awarding imprisonment, 151.
of death, 154.
form of warrant for carrying the same into execution. Appendix, xxxi.
Provost-Marshal to attend at the execution of the, Appendix, xxxii.
boats manned and armed to attend at the execution of the, Appendix, xxxiv.
memorandum to be sent to each captain with. Appendix, xxxv.
cases in which it may be brought under the notice of a superior court, 156.
execution of the, 158. 160.
not to be remitted by Commander-in-Chief, 159.
execution thereof may be suspended, *ib.*
form of. Appendix, xxiv.
awarding corporal punishment, orders consequent on, Appendix, xxxvi. and xxxvii.
SHIP, OR SHIPS,
when two or more captains are borne on the books of one, 20.
must be present to render their respective captains eligible as members of courts-martial, 21.
lost, captains of, not eligible as members of courts-martial, 22. Appendix, vii.
wilfully stranding, 118.
SHIP'S BOOKS,
names of officers and men should be written at full length in, 121.
SHORE,
crimes committed by persons in the fleet, when on, 87.

SODOMY. See title, *Buggery.*
SOLITARY CONFINEMENT,
court-martial cannot adjudge a prisoner to, 151. Appendix, xv.
SPIES,
amenable to courts-martial, 82.
law relating to, 176.
STOLEN GOODS, 48.
STRIKING SUPERIOR OFFICERS, 184.
SUICIDE,
encouraging a person to commit, 114.
SUPERNUMERARIES,
when amenable to courts-martial, 91.

T.

THACKERAY, LIEUTENANT,
case of, 39.
THEFT. See title, *Robbery.*
TRANSPORTED,
court-martial cannot adjudge a prisoner to be, 151. Appendix, xv.
TRIAL,
should not be postponed, 41.

V.

VOTES,
if equal, 140.
of the minority, to be taken on the question of punishment, 154.
VOTING,
order of at courts-martial, 140.

W.

WAGES,
of deserters to be forfeited, 180.
WHITBY, CAPTAIN,
case of, 105.
WITNESS, OR WITNESSES,
a member of the court may be a, 17.
must be examined on oath, 31.
position to be occupied by when under examination, 26.
not to be examined as to the tenets of his religion, 33.

WITNESS, OR WITNESSES — *continued.*
one, generally sufficient, 38.
prosecutor may be a, 38. 77.
an idiot cannot be a, 52.
a lunatic cannot be a, 52,
a person deaf and dumb may be a, *ib.*
an infant may be a, 53. 55.
not to be excluded on account of crime or interest, 53.
accomplice may be a, 53, 54.
not bound to criminate himself, or to make disclosures prejudicial to public interest, 55.
examination of, 59.
irrelevant questions not to be put to the, 60.
leading questions not generally allowed to be put to the, *ib.*
not to be allowed to read his evidence, *ib.*
may refer to notes, 61.
opposite party may inspect notes used by the, *ib.*
copies of documents shown to the, *ib.*
objections to questions put to the, *ib.*
cross-examination of, *ib.*
when called on as to character only, *ib.*
to be confined to the matter in issue, 62.
if the party calling the, refuse to examine him, *ib.*
not to be discredited by the party who called him, 63.
opposite party may adduce evidence to discredit, 64.
examination of, as to crimes committed by the, *ib.*
not to be advised when under examination, 75.
examination of, for the defence, *ib.*
not to be called by the prosecutor after the prosecution has closed, *ib.*
court may recall, *ib.*
should not be examined within hearing of each other, 76.
civilians required as, 78. 80.
form of summons to. Appendix, xxx.

Y.

YOUNG AND WEBBER,
tried for murder by duelling, 194.

THE END.

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